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BOOK REVIEW

THE IRAQI CRIMINAL JUSTICE SYSTEM, AN INTRODUCTION

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The purpose of this article is to serve as a brief introduction to the criminal justice system, such as it is, in Iraq today. It is based on my review of the Iraqi Criminal Procedure Code,[1] my discussions with a small number of individuals—both Iraqi and American—familiar with the system, and my own (admittedly-limited) observations of the system during a six-month military deployment to Baghdad.[2]

One might argue—as many U.S.-trained common-law attorneys do—that a criminal justice system that neither adheres to *stare decisis* nor atomizes crimes into "elements" can hardly provide true justice. An equally-plausible argument

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1. Criminal Procedure Code No. 23 of 1971 (translated alternately as "Law on Criminal Proceedings, With Amendments" and "Criminal Procedure Code") [hereinafter Criminal Procedure Code]. The Criminal Procedure Code contains procedural guidelines for all criminal investigations and trials of felonies and misdemeanors in Iraq. It appears that an official translation was never published in the English edition of *Al-Waqai Al-Iraqiya* (The Iraqi Gazette), the Government of Iraq's official weekly register of national-level policy pronouncements (laws, regulations, and Republican Council Ordinances). However, there are two basic translations of the Code, both undated, both anonymous. The best sources on the internet for the translations, and a variety of other reference materials, are the *Global Justice Project: Iraq* (GJPI) sponsored by the S.J. Quinney College of Law at the University of Utah, *Criminal Procedure Code 23 of 1971*, GLOBAL J. PROJECT: IRAQ, (Apr. 25, 2009), http://www.gjpi.org/2009/04/25/criminal-procedure-code-23-of-1971/. and *Grotian Moment: The International War Crimes Trial Blog* sponsored by the Case Western Reserve University Law School, Iraqi High Tribunal Trials, Grotian Moment: The International War Crimes Trial Blog, http://law.case.edu/saddamtrial/index.asp?t=1 (last visited Oct. 7, 2010). The original translations, including the one posted on the Case Western site, were made between September 1984 (the date of the most recent amendment annotated therein—*see* Criminal Procedure Code, art. 160) and October 1988 (the date of the next most recent amendment thereafter—to Article 47, which is not captured in the translation). The version on the *GJPI* site (currently dated Mar. 14, 2010) is an update of the same translation incorporating subsequent amendments. It has addressed many typographical errors and omissions (*e.g.*, it now includes Article 77 which was previously missing), but it still uses the British spelling of most words.

2. I was deployed in mid-2007 with the initial contingent of the Law and Order Task Force (LAOTF), an experimental unit envisioned by General David Petraeus, then-commander of Multi-National Forces-Iraq, and his Staff Judge Advocate (lead attorney), Colonel Mark Martins. One of our missions was to help with the construction and initial case-processing of the newly-formed Rusafa Branch of the Central Criminal Court of Iraq (CCCI). Although I was able to learn much about Iraqi black-letter criminal law during my deployment, my exposure to the practical aspects of the system is admittedly limited.

could be made that true justice cannot be achieved in a system that insists on having a defendant's fate decided by a lay peer jury with no legal training and that builds a complex network of evidentiary rules that restrict consideration of relevant and probative evidence. To a significant extent, one's determination of justice is based in large part on whether one finds justice in doing right by society (*i.e.*, punishing the guilty despite any corruption or misconduct by the government investigators) or in doing right by the individual (letting an obviously-guilty person go free in order to "punish" the "system").

Although this philosophical dilemma partly prompted this article, it is beyond its scope. This article will not conduct a normative analysis of any particular legal system, nor does it propose to conduct a comparative analysis of the civil law trial-by-judge system such as it exists in Iraq and the common law trial-by-jury system used in criminal trials in the United States. Instead, the goal of this article is to step through the Iraqi criminal justice system writ large—as it is envisioned in the Iraqi Criminal Procedure Code and as I have seen it in practice.

I. IRAQI CRIMINAL JUSTICE SYSTEM—THE PLAYERS

During its short-lived tenure as the de facto Government of Iraq, the Coalition Provisional Authority (CPA) attempted a limited overhaul of the Iraqi criminal justice system.[3] One change was the creation of the Central Criminal Court of Iraq (CCCI);[4] a court with sweeping, nation-wide criminal jurisdiction[5] but a specific mandate to focus on terrorism, organized crime, corruption, and other serious cases.[6] Fortunately for the Iraqis, the CPA did not try to impose procedures or

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3. For example, the CPA abolished the death penalty (although later it was reinstated by the Iraqi-elected government). It also deleted a series of political crimes from the Iraqi Penal Code. Although duly-elected governments subsequent to the extinction of the CPA have directly addressed some of the CPA's actions, I have no data on which to judge the extent to which members of the Iraqi bar—and more specifically the Iraqi judges— accept as legitimate, and accord credence to, the sum total of all changes to Iraqi law made by the CPA.

4. *See* Coalition Provisional Authority Order No. 13 of 2004 (forming the Central Criminal Court of Iraq) [hereinafter CPA Order No. 13]. Although the Code translation available on the GJPI website, GLOBAL J. PROJECT: IRAQ, *supra* note 1, properly advises at page 3 that "publication in . . . [The Iraqi Gazette] would appear to be . . . regarded as a de-facto requirement" for legitimacy of any Iraqi legal decree, I have been unable to determine whether CPA Order No. 13 was properly published in The Iraqi Gazette. Regardless, the Iraqis obviously accept the legitimacy of the CCCI, as it has been in continuous operation since 2004 - investigating, trying, and sentencing thousands of Iraqi citizens.

5. CPA Order No. 13, § 18(1):

> The CCCI shall have nationwide discretionary investigative and trial jurisdiction over any and all criminal violations, regardless of where those offenses occurred. Its jurisdiction shall extend to all matters that could be heard by any local felony, or misdemeanor court.

The traditional Iraqi courts, consisting of investigative courts, misdemeanor (trial) courts, and felony (trial) courts, have limited geographic jurisdiction. Appeals are lodged in regional courts of appeals, with final criminal appellate authority residing in the national Cassation Court.

6. *Id.* § 18(2):

> In exercising its discretionary jurisdiction, the CCCI should concentrate its resources on cases related to:
>
> a) terrorism,
>
> b) organized crime,

substantive law from common-law systems on the new court. Instead, the CCCI is configured and runs in the same way as the regular provincial criminal courts in Iraq. Each branch of the CCCI consists of an Investigative Court and a Felony (trial) Court.[7] The Court implements Iraqi substantive and procedural criminal law the same as other courts.[8] Appeals travel directly to the Court of Cassation.[9] The Iraqi Criminal Procedure Code thus applies to all cases processed through the CCCI, from arrest and detention through investigation, trial, and punishment.[10]

A. A Quick Comparison of Roles and Responsibilities

Regardless of the court in which the Code is being applied, it is important to understand a little about the players in order to understand the Code. Some writers have made the mistake of trying to compare a civil law trial-by-judge system with the common law trial-by-jury system used in criminal trials in the United States.[11] In the confines of an article such as this, to do any kind of satisfactory comparative analysis is impossible. However, by referencing the key benchmarks in both justice systems, it is easy enough to see that they both attempt to arrive at the same goals—public punishment of criminal offenders—albeit from different cultural and historical perspectives.

In the United States criminal justice system, the prosecutor is a personage of enormous power. The prosecutor is the one who reviews data collected by the police (and who, to some extent, directs the type of information and evidence to be collected), who decides whether the evidence is sufficient to go forward, who formulates the nature and content of criminal charges, who controls the offer and acceptance of plea bargains, who decides the means and method by which incriminating evidence will be presented to the fact finder, and, finally, whose charisma and credibility are to some extent in play when lay peer juries are evaluating the sufficiency of the evidence. The prosecutor and police in our accusatorial system work together, often with considerable government resources at their disposal, to investigate allegations of criminal conduct. If they believe a crime has been committed, they then determine (i) who they believe should be held to account for the crime, (ii) in what forum and with what charges the alleged

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c) governmental corruption,
d) acts intended to destabilize democratic institutions or processes,
e) violence based on race, nationality, ethnicity or religion; and
f) instances in which a criminal defendant may not able to obtain a fair trial in a local court.

7. *Id.* § 1(2).

8. *Id.* § 4:
The CCCI shall apply Iraqi law as modified by applicable CPA Orders and this Order.

9. *Id.* § 21:
All appeals arising from CCCI proceedings shall be heard in accordance with applicable Iraqi law as modified by CPA orders but the Court of Cassation shall hear all appeals from the Felony Court.

10. *See id.* § 18.

11. *See, e.g.*, Michael J. Frank, *Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq*, 18 FLA. J. INT'L L. 1, 21 (2006).

offender should be charged, and (iii) the substance and means of presenting the facts to a fact finder.[12] In this system, the judge's role is that of a gatekeeper, a referee who makes sure the charges are supported by reliable and relevant evidence. In the United States system, in which it is paradoxically almost impossible for a lawyer to sit on a jury of peers, the fact-finding panel is given only superficial legal guidance on the legal definitions and presumptions relevant to the particular case it is considering. The purpose of this practice seems to be a desire to ensure that the members are focused solely on the facts as they relate to the charge, rather than on any broad legal consequences of those facts.

In the Iraqi civil-law criminal justice system, the prosecutor and judge basically switch roles. The Iraqi prosecutor is very much an administrative official whose job is to review the case file for completeness, and to provide recommendations to the judges as they try the case and deliberate their findings. The judges (first the investigative judge, then the trial judges) take center stage—literally—as they run the criminal investigation, issue arrest warrants, interview witnesses, determine appropriate charges, weigh the evidence, issue findings, and pass sentences. Whereas the United States criminal justice systems intentionally separate the pre-trial investigation (in which the judge is only tangentially involved) from the trial process, Iraqi courts consider fact gathering to be an integral part of the judicial purview. Although there is obviously a role for some (even significant) data collection prior to the start of official criminal proceedings, the process—at least on paper—calls for the investigative judge (or his[13] own duly appointed judicial investigator) to repeat or confirm all critical facts in the case. While the prosecutor attends the trial (and even remains with the judges during their deliberations), his role is largely administrative in nature.

To an Iraqi lawyer (and likely the average Iraqi citizen on the street as well), the idea that an untrained member of the public could or should be involved in determining something so important as guilt or innocence in a criminal case is preposterous. Trial judges are the best and brightest of the legal profession and have significant training and experience prior to being appointed to the bench. The judges rightly consider themselves experts in knowing what the law says and, more importantly, what it means.[14]

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12. Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187 (2010); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 793-94 (2003).

13. The English translation of the Iraqi Criminal Procedure Code uses the masculine pronoun throughout, except as required for context; this article will do the same.

14. Although case verdicts, much less judicial explications of the same, are not formally recorded for future reference in other unrelated cases, there actually is a system in place for checking poor judicial performance. One of the roles of the Public Prosecutor is to ensure that the law is followed. They can report a judge if they believe the judge has acted inappropriately. Furthermore, the Minister of Justice and appellate court presidents review the work product of and have disciplinary authority over all investigative and trial judges. Judicial Organization, Law No. 160 of 1979 (Iraq), arts. 55-60, *available at* http://www.gjpi.org/wp-content/uploads/2009/01/jud_org_law.pdf; CPA Order No. 13, § 5(2) (authorizing removal of judges only upon "clear evidence of unlawful or unethical conduct, breaches of the requirements of this Order, or incompetence on the part of the member.").

It is a truism that the standard American lawyer answer to any legal question is "it depends"—because a slight change in the facts can often lead to significant changes in legal consequences. However, once all relevant facts have been determined, a lawyer can give a definitive answer based on the law as it stands at that time. Of course, the well-entrenched principle of judicial review allows American courts to decide that one or another social (non-legal) consideration should affect the outcome of the case.

Iraqi judges do not have such leeway. Their job is to apply the facts to the plain wording of the law. As such, the concept of following precedent is meaningless because it is irrelevant: an Iraqi judge is commissioned to determine whether the accused in a particular case violated the law *vel non*.[15] Looking to other cases will not tell us whether this accused is guilty or not. To paraphrase General David Petraeus' September 2007 interviews leading up to his testimony before Congress, the facts inform the law rather than drive it.[16]

This point is further driven home by the simple fact of the timing of the official charge. In the American court system, the accused is charged prior to trial proceedings. The entire focus of the prosecution case is directed toward the specific wording of the charge. On many occasions, the defense case is built around trying to defeat one or more elements of the specific charge rather than to completely deny responsibility for any criminality. In the Iraqi system, although an accused is certainly aware of the type of criminal incident for which he is being investigated, the official charge is almost anticlimactic as it comes at the end of the trial. This one procedural change obviates an accused's ability to structure a defense argument built around hypertechnical attacks on the verbiage of the charge and holding the government to what it thought it could prove. Instead, it puts the focus of the entire proceeding on a determination of the facts and their consequence under the law. The Iraqi judges spend their time trying to determine what, if anything happened. Only after ascertaining the facts (with or without counterargument by defense counsel[17]) are the Iraqi judges in a position to formally charge the accused. In Iraq, no one gets off on a technicality.

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15. I have no data to justify any discussion of judicial corruption where racial or religious biases factor into the judges' decisions.

16. *Time to Head to Congress: Gen. Petraeus Preps for Much-Anticipated Iraq Progress Report*, ABC NEWS, Sept. 4, 2007, http://abcnews.go.com/WN/story?id=3556742&page=1. Gen. Petraeus said that troop fatigue issues would "inform" rather than "drive" his recommendations regarding troop cuts. *Id.*

17. Although all persons accused of felonies or misdemeanors are entitled to court-appointed defense counsel, Article 19, § 11, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005 ("The court shall appoint a lawyer at the expense of the state for an accused of a felony or misdemeanor who does not have a defense lawyer."), and an accused has a right to present a defense in all phases of investigation and trial, *Id.* at Article 19, § 4 ("The right to a defense shall be sacred and guaranteed in all phases of investigation and the trial."), the defense bar is still struggling to find its voice. *See infra* Section II.E.7. Defense counsel issues.

B. The Players—Qualification, Training, Appointment, and Tenure

All players in the Iraqi criminal justice system are trained professionals. Although there appear to be no special training requirements for defense lawyers (whether appointed or retained), other than graduation from law school,[18] Iraqi law imposes specific requirements on all prosecutors and judges involved in the investigation and trial of accused criminals.[19]

1. The Police

As with American society, the "face" of the criminal justice system that is most familiar to the average Iraqi is the police officer. Civilian police officers—members of the Iraqi Police or the Iraqi National Police, both of which fall under the Ministry of Interior (MOI)—patrol the streets, act as first responders, and conduct the initial (perfunctory) crime scene investigations. Together with the Iraqi military, the police units were a major focus of intense rebuilding efforts and training efforts following the U.S.-led occupation in 2003, most notably from the Civilian Police Assistance Training Team (CPATT), a subdivision of Multi-National Security Transition Command-Iraq (MNSTC-I).[20] International police-training teams have been working closely with new recruits to accomplish the goal of a competent and corruption-free force. One of the primary training facilities for the Iraqi Police is the Baghdad Police College located in Rusafa, a neighborhood wedged along the east side of the Tigris River between Baghdad proper and Sadr City.[21]

The original curriculum at the Police College was a three-year course of study covering such diverse topics as the Penal Code, constitutional law, economics, languages (Kurdish, English, and Persian), first aid, fingerprinting and criminal photography, weapons training, horsemanship, criminal sociology, Islamic law, and forensic medicine.[22] Candidates for the Police College must be young, healthy, upstanding Iraqi citizens.[23] As it turns out, the Police College is an interesting cultural experiment in and of itself—bringing Shia and Sunni cadets together in an environment where they have to learn to rely on each other.

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18. Law school in Iraq, as with the Police College, is a four-year post-secondary baccalaureate program. There is no tuition expense for an individual's first undergraduate degree. Interview with Zuhair Al-Maliki, former Chief Investigative Judge of the Central Criminal Court of Iraq (CCCI), in Baghdad, Iraq (Aug. 6, 2007).

19. Judicial Institute, Law No. 33 of 1976 (Iraq), arts. 1, 8.

20. MNSTC-I was a direct subordinate command of the Multi-National Corps-Iraq, which in turn reported directly to Multi-National Forces-Iraq.

21. OFF. OF THE SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION, REPORT NO. PA-08-152, ANBAR RULE OF LAW/JUDICIAL COMPLEX, RAMADI, IRAQ 2 (2009), *available at* http://www.sigir.mil/files/assessments/PA-08-152.pdf.

22. *See* Of the Police College, Revolutionary Command Council Regulation No. 1 of 1969, art. 18.

23. The original regulation creating the modern Police College specified that recruits must be Iraqi nationals whose father was Iraqi and whose mother was at least from an Arab country, high school graduates, between sixteen and twenty-two years six months of age, at least 165 cm tall with a chest measuring at least 80 cm, able to pass a medical examination or physical fitness test, and "of good conduct and reputation, not convicted on a felony or misdemeanor degrading the Honor." *Id.* art. 10.

2. Judicial Investigators

In addition to police detectives and investigators, there are groups of "judicial investigators" who are lawyers working directly for the investigative judges. Their duty is to investigate the crime scene in the absence of the investigative judge and to conduct any other inquiries directed by the investigative judge.[24]

3. The Public Prosecutor and the Judges

With a few special exceptions, all prosecutors and judges are graduates of the Judicial Institute,[25] a two-year specialized course designed to raise the "efficiency" of those who desire to enter the public judiciary.[26] To be eligible for acceptance,

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24. Criminal Procedure Code No. 23 of 1971 (Iraq), art. 51:

> A. The initial investigation shall be conducted by investigative judges or by judicial investigators acting under the supervision of investigative judges.
>
> B. In case of necessity and if an investigative judge is not available an immediate decision may be made or immediate action taken in the course of an investigation into a felony or misdemeanor, provided that the officer responsible for the investigation lays the matter before any judge within the investigative judge's area of competence, or within all adjacent area, so that the judge may consider what action needs to be taken.
>
> C. Any judge may conduct an investigation into a felony or misdemeanor that has taken place in his presence if an investigative judge is not available.
>
> D. The relevant documents in the cases specified in sub-paragraphs B and C shall be submitted as quickly as possible to the investigative judge concerned and the decisions and action provided for in those two paragraphs shall be subject to the decision and action taken by the investigative judge.
>
> E. The judicial investigator shall be appointed by order from the Minister of Justice, provided he possesses a recognized qualification in law or holds a recognized diploma from the legal department of the technical institutes. Police officers and sub-officers and legal officers of the Ministry of Justice may be granted the powers of a judicial investigator by order from the Minister of Justice.
>
> F. No judicial investigator may perform the functions of his office for the first time unless he has passed a special course of the Judicial Institute of no less than three months if he obtained a recognized law degree or no less than a full calendar year if he holds a recognized diploma from the legal department of the technical institutes and he has sworn the following oath before the President of the Court of Appeal:
>
> *"I swear by Almighty God that I shall perform the functions of my office with justice and shall apply the law faithfully."*

25. As an exception, a 2006 Amendment of the Law of Judicial Organization provided:

> It is permitted to appoint the lawyer or the public employee who holds a bachelor degree in law as a judge by a presidential decree in exception from the requirement of being a graduate from the Judicial Institute provided that he has spent at least ten years in the law profession or worked in the courts, and that he is not over fifty years of age.

The author has a copy of the text of the law, but no information regarding its number or date of publication in The Iraqi Gazette. Amendment to the Judicial Organization Law No. 160 of 1979, 2006 (Iraq). The substance of the law was confirmed in a personal interview with Zuhair Al-Maliki, a former Chief Investigative Judge for the Central Criminal Court of Iraq (CCCI)—who personally benefitted from it because he himself not a graduate of the Judicial Institute. Interview with Al-Maliki, *supra* note 18.

26. Judicial Institute, Law No. 33 of 1976 (Iraq), arts. 1, 8.

one must obviously be a lawyer, and one must demonstrate a solid background and good credentials.[27]

The actual application process for the Judicial Institute apparently involves three steps: a general written test in knowledge of the law, an oral exam in the form of an interview by a panel of five judges/prosecutors, and—most importantly—an "appearance" test, which is a separate interview by a panel of five judges/prosecutors to determine if the candidate looks, talks, and acts like a judge. An unwritten requirement, which can be a showstopper, is one's judicial pedigree—coming from the right family and having ties to the right influential people.[28]

The curriculum at the Judicial Institute mirrors subjects covered in law school,[29] but the courses are taught by experienced lawyers and former judges who discuss the practical application of the law.[30] At the end of the first year of studies, the top students are placed in a judgeship track while the rest continue in a public prosecutor track.[31] Thus, lawyers identified as future judges and future prosecutors train side by side.

To be eligible for appointment as a judge in the courts of Iraq, one must be Iraqi by birth, married, and a graduate of the Judicial Institute.[32] The original oath of office read as follows:

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27. The Iraqi Judicial Institute Law spells out eligibility criteria, to include being Iraqi by birth, less than thirty-six years old upon matriculation, never implicated in a non-political crime involving dishonor, of good conduct and reputation, physically fit, and a law school graduate. Later amendments relaxed the age requirement to a range of twenty-eight to forty, Revolutionary Command Council Resolution No. 665 of 1981 (Iraq), but, later amendments also added the requirement that the applicant's parents both be Iraqi by birth, *id.*, and that the applicant be married. First Amendment to the Law of Judicial Institute No. 33 of 1976, Law No. 7 of 1980 (Iraq).

28. Interview with Al-Maliki, *supra* note 18.

29. First year subjects include civil law, penal law, evidence, personal status law, civil procedure, criminal procedure, Arabic, and French or English. Second year subjects are criminal investigation, forensic medicine, criminal psychology, and conflicts (for future judges) or comparative public prosecution (for future prosecutors). Amendment to the Law of Judicial Institute No. 33 of 1976, Law No. 18 of 1988 (Iraq), art. 5. Note that the study of evidence likely consists of studies related only to For Evidence Law No. 107 of 1979 (Iraq), art. 11. This law specifically applies to civil, commercial, and personal status cases. *Id.* There is no law of evidence applicable to the criminal law.

30. Interview with Al-Maliki, *supra* note 18.

31. *Cf.* Judicial Institute Law No. 33 of 1976 (Iraq), art. 17 (specifying that graduates assuming either a judgeship or an assistant prosecutor position must be "among those eligible" for each of the two respective posts). Note that there appears to be no further specialization. Thus, all future judges take the same course of studies, regardless of whether their future employment will be in the criminal courts, the administrative courts, the personal status courts, the juvenile courts, or the labor courts.

32. Judicial Organization Law No. 160 of 1979 (Iraq), arts. 36, § 1, *available at* http://www.gjpi.org/wp-content/uploads/2009/01/jud_org_law.pdf. The requirement, *see supra* note 27, that applicants to the Judicial Institute not only be Iraqi by birth but born to parents who themselves were Iraqi by birth, applies equally to judicial appointees. *See* Revolutionary Command Council Resolution No. 665 of 1981 (Iraq). On the other hand, the requirement that judicial appointees be graduates of the Judicial Institute is subject to the exception also noted above—*i.e.*, that non-graduates may be appointed by Presidential decree. Amendment to the Judicial Organization Law No. 160 of 1979, 2006 (Iraq); *see supra* note 25.

> I swear by god that I shall judge among people with justice and apply the Laws honestly with what comply with their goals in building the united democratic socialist society.[33]

Judges are eligible for promotion every five years.[34] Their rise through the ranks of four pay grades (from "Fourth Class" or "Grade D" up to "First Class" or "Grade A"[35]) determines, in addition to salary raises, their eligibility for specific postings (from regional offices to the more exclusive positions in Baghdad, as well as from investigative to trial judge). Thus, only the more senior members of the judiciary are eligible for trial and appellate judgeships and other positions of importance.[36] Judges may continue to serve until mandatory retirement at age sixty-three[37] unless removed involuntarily after receiving two poor performance reports while in the same grade or if deemed incompetent.[38]

Prosecutors are to be pillars of uprightness.[39] More specifically, the role of the Public Prosecutor is to be a check on judicial overbearance and to ensure justice throughout the criminal justice system. Thus, they are specifically tasked with a wide and varied set of responsibilities:

- Review and opine on proposed judicial actions (1) transferring a case to trial, (2) ordering collection of body fluids, hair samples, or fingerprints, and (3) attaching property of a fugitive or accused;[40]
- Oversee cases originating by action of a criminal complainant;[41]
- Inspect detention centers;[42]
- Review all death penalty cases before submission to the Court of Cassation; and[43]
- Attend investigative hearings as well as trials, cross-examine, and advise the judges on the disposition of a case.[44]

The career path of prosecutors mirrors that of judges. Thus, as with judges, a prosecutor must be Iraqi by birth, married, and a graduate of the Judicial Institute.[45] They take a similar oath.[46] They are eligible for promotion every five

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33. Judicial Organization, art. 37, § 2.
34. *Id.* art. 38.
35. *Id.* art. 45.
36. *See id.* arts. 30, 47, 48, 50, 54.
37. *Id.* art. 42.
38. *Id.* arts. 39, 58, 59.
39. Public Prosecution Law No. 159 of 1979 (Iraq), art. 39.
40. *Id.* art. 4.
41. *Id.* art. 7, § 1.
42. *Id.* art. 7, § 2.
43. *Id.* art. 28, § 1(C).
44. Amendment to the Law of Public Prosecution No. 159 of 1979, Law No. 15 of 1988 (Iraq), art. 2.
45. Public Prosecution Law, art. 41, para. 1. Since prosecutors, like judges, must be graduates of the Judicial Institute, and since applicants to the Judicial Institute must not only be Iraqi by birth but born to parents who were Iraqi by birth, it follows that prosecutors must be Iraqi born to Iraqi parents. *See supra* note 27. On the other hand, the exception allowing judges to be appointed who are not

years.[47] Furthermore, they, too, rise through four pay-grade levels, and their salary structure appears to be identical to that of judges.[48] Finally, they are subject to mandatory retirement with pension at age sixty-three.[49]

II. IRAQI CRIMINAL JUSTICE SYSTEM—THE PROCESS

Unlike the United States' criminal justice process, where informal fact-gathering in preparation for the formal (accusatorial) trial process is largely done outside the realm of the disinterested judicial branch of government, the Iraqi penal system—structured similarly to the Egyptian and continental civil law models—considers the investigatory, fact-gathering phase as the actual first step in its formal (inquisitorial) trial process.[50] Although there is obviously a role for some (even significant) data collection prior to the start of judicial involvement, the process—at least on paper—calls for the investigative judge (IJ) (or his own staff "judicial investigator") to repeat or confirm all critical facts in the case.

The remainder of this article will set out both the black-letter law from the Iraqi Criminal Procedure Code and the way I observed it in practice—with the caveat that my exposure to the process was meager at best and limited to small portions of Baghdad.

A. The Initial Investigation

The initial investigation includes all government-led pre-trial actions taken in response to a discovery or report of a crime. Criminal cases in Iraq, as in the United States, begin either when the police arrest a suspect or when an individual presses charges.[51] A complaint can be instigated by an injured party, his representative, or a government official in the judicial system.[52] Because crimes are essentially torts where the state sues on behalf of the victim (and society at

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Judicial Institute graduates does not expressly apply to prosecutors. Amendment to the Judicial Organization Law No. 160 of 1979, 2006 (Iraq); *see supra* note 25.

46. Public Prosecution Law at art. 42, para. 2:

> I swear by God to perform the works of my duty and apply the Laws with [sic] loyally and faithfully in conformity with its aims in Building the United Socialist Democratic Society.

47. *Id.*art. 43, para. 1.

48. *Compare* Public Prosecution Law, art. 43, *with* Judicial Organization Law No. 160 of 1979 (Iraq), art. 38.

49. Public Prosecution Law, art. 57, para. 1.

50. *See* CPA Order No. 13, §§ 1-2 (2004); Criminal Procedure Code No. 23 of 1971 (Iraq), art. 51.

51. Criminal Procedure Code, art. 1(A):

> Criminal proceedings are initiated by means of an oral or written complaint submitted to an investigative judge, a [judicial] investigator, a policeman in charge of a police station, or any crime scene officer by an injured party, any person taking his place in law, or any person who knows that the crime has taken place. In addition any one of those listed can notify the Public Prosecution unless the law says otherwise. In the event of a witnessed offence the complaint may be submitted to whichever police officers or sub-officers are present.

52. An attorney in fact cannot prosecute a case on behalf of an estate. *See id.* art. 9(D):

> If a person who had the right to submit the complaint dies, the right to submit the case does not transfer to his heirs.

large), the Iraqi system melds any private tort cause of action with the public prosecution. The criminal complaint is thus not only a claim for criminal justice and request that punitive action be taken against a perpetrator, but it includes the concomitant civil action as well.[53]

Some complaints must be filed by the victim alone,[54] but other individuals can provide information on a criminal case—such as eyewitnesses,[55] persons who encounter evidence of a crime,[56] police officers,[57] and certain professionals

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53. *Id.* art. 9(A):

> The submission of the complaint should include the claim for criminal justice which is a petition that penal measures be taken against the perpetrator of the offense and for the penalty to be imposed on him. The written complaint includes the claim for civil justice as long as the complainant does not declare otherwise.

54. *See id.* art. 1(A); *see also supra* note 51. The victim ("aggrieved party") or his representative must personally file the complaint in cases involving such crimes as adultery, polygamy, defamation, divulging secrets, verbal assault (if the victim was not engaged in public service), theft, rape, breach of trust, fraud, damage to or sabotage of private property, trespass, or throwing objects at vehicles, buildings, gardens, or compounds. Criminal Procedure Code, art. 3(A). Such complaint must be filed within 3 months (of the crime or notice thereof), absent compelling extenuating circumstances. *Id.* art. 6. If there are multiple victims, only one need file the complaint. *Id.* art. 4(A). If there are multiple accused, a complaint against one is a complaint against all—except in the case of adultery (where complaints must be filed separately against both perpetrators, including one's spouse). *Id.* art. 4(B).

55. Criminal Procedure Code, art. 1(B):

> An offense is considered to have been witnessed if it was witnessed whilst being committed or a [sic] shortly afterwards or if the victim followed the perpetrator afterwards or if shouting crowds followed him afterwards or if the perpetrator was found a short while later carrying the equipment or weapons or goods or documents or other things pointing to the fact that he was a perpetrator or participant in the offense or if traces or signs indicate this at the time.

56. *Id.* art. 47(1):

> Any person against whom an offense is committed and any person who learns that an offense has been committed in respect of which proceedings have been instituted without a complaint being submitted, or who learns that a suspicious death has occurred, may inform the investigative judge or the [judicial] investigator or the Public Prosecution or any police station.

57. *Id.* art. 49:

> A. Any policeman in charge of a police station receiving information that a felony or misdemeanor has been committed shall immediately record the informant's statement in writing and require the informant to append his signature. He shall then send a report of the matter to the investigative judge or [judicial] investigator. If the information he has received makes it clear that the felony or misdemeanor took place in the presence of witnesses then he shall take the action specified in Article 43.
>
> B. If the information he has received makes it clear that an infraction has been committed he shall send a summary report of the offense to the [judicial] investigator or investigative judge. The report shall give the name of the informant, the names of witnesses and the section of the law that applies to the incident.
>
> C. The policeman in charge of a police station must in every case enter in the station logbook a summary of the information received concerning an offense and the time at which the information was received.

designated as mandatory reporters, including public servants and medical professionals.[58]

Once a complaint has been filed or a case opened, it has a life of its own. It cannot be withdrawn; nor can execution of the judgment be stopped[59]—not even in the event of the death of the complainant.[60]

In theory, the investigative process appears redundant. The Code identifies at least three types of investigating officials—crime scene investigating officers,[61]

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58. *Id.* art. 48:

> Any public servant who, in the course of performing his duties or as a consequence of performing his duties, learns that an offence has been committed or suspects that an offence has been committed in respect of which proceedings have been instituted without a complaint, and any person who has given assistance in his capacity as a member of the medical profession in a case where there are grounds for suspecting that an offence may have been committed us [sic] well as any person who is present when a felony is committed must immediately inform one of the persons specified in Article 47.

59. *Id.* art. 2:

> The complaint may not be dropped, cancelled or withdrawn from nor can the judgment issued on it be withdrawn from or not executed, except under the circumstances explained in the law.

The exceptions seem to include the fact that the victim-complainant may withdraw from the complaint. *Id.* art. 9(C):

> The person who submitted the complaint has the right to withdraw from it. If a number of persons submitted the complaint and some of them withdraw, this does not invalidate the rights of the others.

Withdrawal of one of several complainants does not affect the case. *Id.* art. 9(E):

> If there are many persons accused and the complaint against one of them is withdrawn, this does not extend to the others, unless the law stipulates otherwise.

60. *Id.* art. 7:

> If the aggrieved party passes away after submitting the complaint, this death will have no effect on the processing of the complaint.

Contrast this with the situation where a complainant in an existing case later dies. *Id.* art. 9(D):

> If a person who had the right to submit the complaint dies, the right to submit the case does not transfer to his heirs.

61. *Id.* art. 39. "Crime scene officers" or investigating officers—not to be confused with the judicial investigators working at the behest of the investigative judge—include, "according to their areas of competence." *Id.*:

> i. Police officers, police station commanders and sub-officers.
>
> ii. Mayors of villages and of urban neighborhoods—in respect of the notification of offenses, the apprehension of suspects and the safe custody of persons who should be detained.
>
> iii. Railway stationmasters and their deputies, train guards/conductors, port managers/harbormasters, airport managers and captains of ships and aircraft and their deputies—in respect of offenses committed within their areas of responsibility.
>
> iv. Heads of government departments and official or semi-official establishments and agencies—in respect of offenses committed within their areas of responsibility.
>
> v. Public servants authorized to investigate offenses and take appropriate action within the limits of the powers accorded to them by the relevant laws.

judicial investigators (sometimes simply called "investigators"),[62] and the investigative judge (IJ) himself. Regardless of their organizational affiliation, the on-scene investigating officers, when acting in that capacity, report directly to the Public Prosecutor's Office.[63] However, if they are derelict in their duties, they answer directly to the IJ.[64] These first responders conduct an initial round of data collection[65] before reporting the matter to the IJ or the Public Prosecutor's Office.[66]

The investigating officer's duty is to "go immediately" to the situs of the crime and proceed to take statements (including from the alleged perpetrator),

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62. *Id.* art. 51; *see also supra* note 24 and corresponding text, discussing judicial investigator authorities as defined in Article 51.

63. Criminal Procedure Code, art. 40(A):

> Each crime scene officer acts within the bounds of his area of competence, under the supervision of the Public Prosecution and in accordance with the provisions of the law.

64. *Id.* art. 40(B):

> Crime scene officers are subject to the control of the investigative judge, who may request the superiors of such officers to look into any case where an officer acts in a manner inconsistent with his duties or is remiss or negligent in his work and to institute disciplinary proceedings against him, such proceedings being without prejudice to the officer's liability to criminal proceedings should he commit an act that constitutes an offense.

65. *Id.* art. 43:

> When a crime scene officer, within his area of competence as specified in Article 39, is informed or becomes aware that an offense has been committed in the presence of witnesses, he is required to notify the investigative judge and the Public Prosecution of the occurrence of the offense, to go immediately to the place where the offense occurred, to take down in writing a statement from the victim of the offense, to orally question the person about the accusation made against him, to impound any weapons and anything that may appear to him to have been used in the commission of the offense, to examine and preserve any material traces of the offense, to establish the status and whereabouts of the persons involved and or [sic] anything else that may assist in investigating the offense, to hear statements by any person who was present or that can obtained [sic] from other persons concerning the facts of the case or the perpetrator of the offense and to cause a written record of all such information to be duly made.

66. *See id.* art. 46:

> The crime scene officer's task ends when the investigative judge, [judicial] investigator or representative of the Public Prosecution arrives, except in regard to any matter for which they assign responsibility to him;

see also id. art. 50(A):

> As an exception to the first sub-paragraph of Article 49, the policeman in charge of a police station shall conduct an investigation into any offense if he is instructed to do so by an investigative judge of [sic] [judicial] investigator or if he considers that referring the informant to an investigative judge or [judicial] investigator would delay necessary action and result in evidence of the offense being destroyed or lost, the course of the investigation being impaired or the suspect fleeing, provided that the officer submits the documentary record of the investigation to the investigative judge or the [judicial] investigator as soon as he has completed it;

id. art. 51(A):

> The initial investigation shall be conducted by investigative judges or by [judicial] investigators acting under the supervision of investigative judges.

collect evidence, and make inquiries.[67] They have authority to "forbid" the movement of witnesses/personnel at the scene and to issue summonses for the appearance of other necessary witnesses, but they apparently do not have enforcement authority;[68] instead, they simply note any refusal to cooperate in their official record of the case.[69] This investigation is preliminary to the official investigation conducted by the IJ or the IJ's own judicial investigator: the investigating officers merely pass all information and evidence received (there are no specific chain-of-custody requirements[70]), including their own narrative report of their investigative actions, to the court authorities as part of the case file.[71]

B. The Initial Investigation, Some Observations

Following the 2003 U.S.-led occupation of Iraq, and the subsequent violent backlash from the various groups hostile to Coalition operations, the security situation worsened to the point that traditional police could not conduct criminal investigations as they had done previously during the relatively secure environment managed by the Saddam regime.[72] Thus, for several years, the civilian police—through lack of training and resources, were unable to perform their regular crime-prevention and crime-investigation roles. This responsibility thus fell to various Coalition groups who conducted patrols either on their own or as training missions for Iraqi forces.[73] Given the high level of violence, it simply was not feasible, in most instances, for first responders to cordon off a crime scene and collect forensic evidence—even if they had been so inclined. Furthermore,

67. *Id.* art. 41:

> Crime scene officers are authorized within their areas of competence to inquire into offenses and to receive any statements and complaints that may be made in regard to these offenses. They are required to assist the investigative judge, [judicial] investigators, police officers and sub-officers, to pass on to them any information concerning the offenses that may come into their possession, to apprehend those who committed the offenses and to deliver them to the appropriate authorities. They are also required to record all action taken in official reports signed by them, stating the time and place the action was taken, and to deliver immediately to the investigative judge all statements, complaints, reports and other documents and all impounded items and substances.

68. *But see id.* art. 45:

> The crime scene officer may request the assistance of the police if necessary.

69. *Id.* art. 44:

> When a crime scene officer goes to the place where a witnessed offense has occurred he may forbid those present to leave or move away from the scene of the offense until an official record has been made. He may also summon immediately any other person who may be able to supply information establishing the facts of the case; if any person refuses such summons the investigating officer shall note the refusal in the official record.

70. *See id.* art. 42:

> Crime scene officers are required to use all possible means to preserve evidence of an offense.

71. *Id.* art. 41; *see also supra* note 67.

72. *See* ROBERT M. PERITO, U.S. INST. PEACE, THE COALITION'S PROVISIONAL AUTHORITY'S EXPERIENCE WITH PUBLIC SECURITY IN IRAQ, 3-5 (2005), *available at* http://www.usip.org/resources/coalition-provisional-authoritys-experience-public-security-iraq-lessons-identified.

73. *See id.*

during the heady days of the 2007 surge, most arrests were of terrorism suspects—many of whom were treated as security internees rather than as criminal detainees.[74]

C. Pretrial Investigation—The Initial Judicial Phase

Once the police or other investigating officer has concluded the initial fact-gathering phase and turned over all reports, statements, and evidence, the investigative judge takes over the case. The Code anticipates that the IJ's investigation will occur in two phases. The first phase is an "initial" investigation of the crime scene and related environs[75] in which the IJ travels about—even outside his geographical jurisdiction, if necessary—making arrests, conducting searches, and collecting evidence.[76] The second phase of the investigation is a formal hearing conducted in the IJ's offices.[77]

The purpose of the IJ's investigation is to create a dossier, which will be used as the official record during the trial.[78] In a very real sense, the IJ is the quintessential finder of fact because testimony at trial—if there is any at all[79]—is often a formality, merely confirming the facts already established by the IJ. As such, this pretrial investigation may have more bearing on establishing the ultimate fate of the accused than does the trial itself.

In establishing the facts of the case, the IJ holds almost unlimited authority—over the scope of the inquiry, the format and substance of testimony, the witnesses, and even public access to the proceedings. Thus, for example, other than

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74. *See* Criminal Procedures, CPA Memorandum No. 3 of 2003 (Iraq), § 7; *see also infra* note 109 and corresponding text for more discussion about security internees.

75. Criminal Procedure Code, art. 52:

> A. The investigative judge shall conduct the investigation into all offences in person or by means of [judicial] investigators. He may authorize any crime scene officer to carry out any particular action on his behalf.
>
> B. The scene of the incident shall be examined by the [judicial] investigator or judge so that he may take the action specified in Article 43, record the nature of any material trace or evidence of the offence and of the injury sustained by the victim, note the apparent cause of any death that has occurred and arrange for a sketch-map of the scene of the incident to be made.
>
> C. If the investigative judge is notified of an offence that has occurred in the presence of witnesses he must, whenever possible and without delay, go to the scene of the incident in order that he may take the action specified in sub-paragraph B and notify the Public Prosecution accordingly.

76. *Id.* art 56(A):

> The investigative judge may move to any other place within his area or jurisdiction to conduct any part of his investigation, if such a move is required in the interest of the investigation, he may move to any place outside his area of jurisdiction if the exigencies of the investigation so require. In this case he shall have powers of apprehension, arrest and search, and authority to hear witnesses, to question suspects and persons connected with the incident under investigation and to release persons with or without bail, provided that he notifies the investigative judge of the district of the measures he has taken in that district.

77. *See id.* art. 57; *see also infra* note 80.

78. *See infra* note 240 and corresponding text.

79. *See* Criminal Procedure Code, art. 167; *see also infra* text accompanying note 300.

individuals specifically authorized by the IJ to attend the hearing, only the accused and the plaintiff (victim) are allowed in the room—and even they may be excluded by the IJ for good cause shown.[80]

The closed nature of the hearing obviously does not extend to necessary fact witnesses. In fact, although there is provision for collection and consideration of "hard" evidence, Iraqi criminal procedure writ large is clearly slanted in favor of witness testimony—and lots of it. In an interesting chicken-and-egg phenomenon, Iraqi praxis and the Code have both evolved to disfavor consideration of forensic or other non-testimonial evidence.[81] It is true that the Code does provide for appointment of expert witnesses (who obviously work for the court, not for the prosecution or defense),[82] and authorizes the IJ to collect[83] forensic evidence (from both accused and victim)[84] and to conduct exhumations.[85] However, the primacy

80. Criminal Procedure Code, art. 57:

> A. An accused person, a plaintiff, a civil plaintiff, a person responsible in civil law for the actions of the accused and their representatives may attend the investigation while it is in progress. The judge or the [judicial] investigator may prohibit their attending if the matter in hand so requires, for reasons that he shall enter in the record, with the proviso that they shall be granted access to the investigation as soon as the need to prohibit their attendance ceases and that they shall not have the right to speak unless permitted to do so and that if permission is withheld a note to that effect shall be entered in the record of the investigation.
>
> B. Any person who makes a request may receive a copy of the papers unless the investigative judge considers that to provide them would affect the course or confidentiality of the investigation.
>
> C. No person other than those previously mentioned may attend the investigation unless the investigative judge gives permission.

81. *See id.* art. 61:

> A. Testimony is to be given orally but permission may be given for the witness to refer to written notes if the nature of the evidence so requires.
>
> B. Any person who is unable to speak may give his evidence in writing or in conventional sigh [sic] language if he is unable to write.
>
> C. If a witness does not understand the language in which the investigation is being conducted, or is deaf or dumb, a person must be appointed to translate what the witness says, or interpret the witness's sign language, after taking an oath that he will translate or interpret truthfully and faithfully.

82. *Id.* art. 69:

> A. The [investigative] judge or [judicial] investigator may, of his own accord or based on the request of the parties, appoint one or more experts to offer opinions on matters connected to the offense being investigated.
>
> B. The investigative judge or [judicial] investigator may ask the expert to attend when called.
>
> C. The [investigative] judge may permit the wages of the expert be borne by the treasury as long as the price is not unreasonably high.

83. *See infra* note 116 and accompanying text.

84. Criminal Procedure Code, art. 70:

> The investigative judge or [judicial] investigator may compel the plaintiff or defendant in a felony or misdemeanour case to cooperate in physical examination or the taking of photographs, or through fingerprinting or analysis of blood, hair, nails, or other items for the purposes of the investigation. Physical examination of a female should be conducted by another female.

85. *Id.* art. 71:

of testimony is firmly entrenched: the first order of business during the formal investigation is a thoroughgoing exposition of facts by the complainant and victim.[86]

So compelling is the preference for witness testimony that, while the rules regarding physical evidence are minimal or hardly referenced in the Code, the details regarding calling of witnesses are extensive. Witnesses can be summoned to appear and testify under penalty of arrest for contempt.[87] More importantly for the accused, although there is a right against self-incrimination,[88] the protection is not without its limits (either in theory or in practice) given the significance laid on in-court confessions.[89] For example, spousal communications are the only recognized category of privilege, but the privilege is not absolute.[90] All of-age witnesses questioned during the hearing speak "on oath."[91] They must identify

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The investigative judge may, if necessary, give permission for the exhumation of a corpse by an expert or specialist doctor, in the presence of those with a connection who are able to attend, in order to establish the cause or [sic] death.

86. *Id.* art. 58:

An investigation is to commence with the recording in writing of the deposition of the plaintiff or informant, then of the testimony of the victim and other prosecution witnesses and of anyone else whose evidence the parties wish to be heard, and also the testimony of any person who comes forward of his own volition to provide information, if such information will be of benefit to the investigation, and the testimony of any other persons who the investigative judge or [judicial] investigator learns is in possession of information concerning the incident.

87. *Id.* art. 59:

A. Witnesses are to be summoned by the investigative judge or [judicial] investigator to attend during the investigation by means of a writ of summons which will be served upon them by the Police or by an official of the department issuing the writ or by a village or district mayor or by any other person authorized by law. Writs of summons addressed to persons employed in government establishments or agencies or in official or semi-official departments may be served on them by their departments.

B. In the case of offences committed in the presence of witnesses the witnesses may be summoned orally.

C. An investigative judge may issue an order for the arrest of any witness who fails to attend in due time and for him to be compelled to attend in order to give evidence.

88. *Id.* art. 126(B):

The accused is not required to answer any of the questions he is asked;

see also infra Section II.E.8. Self-incrimination.

89. *See infra* text accompanying note 114.

90. Criminal Procedure Code, art. 68:

A. No married person shall be a witness against his or her spouse unless he or she is accused of adultery or an offence against the spouse's person or properly [sic].

B. One of the persons aforementioned may be a defense witness for the other and any part of his or her evidence leading to the conviction of the accused shall be deemed to be invalid.

91. *Id.* art. 60(B)-(C):

B. Each witness who has attained the age of fifteen years is to be required, before he gives evidence, to swear on [sic] oath that the evidence he will give shall be the truth. Any person who has not attained the aforementioned age may be heard

their relationship to the accused, the victim, and the complainant.[92] Pains are taken to accommodate the live testimony of witnesses, to include the use of memory aids, sign language, and translators.[93] Each witness' statement must be reduced to writing and witnesses may be recalled to clarify previous testimony.[94] The preference for a live witness is so strong that the Code provides for payment of witness travel costs[95] and instructs the IJ to travel to the witness' location if necessary to procure live testimony.[96] On the other hand, once a witness is under examination, the IJ controls the nature, substance, and delivery of all questions

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for the purpose of evidential inquiry without being on [sic] oath.

C. A complainant and a civil plaintiff may be heard as witnesses and may take the oath.

92. *Id.* art. 60(A):

Each witness is to be asked to state his full name, occupation, place of residence, relationship to the accused, to the victim, to the complainant and to the civil plaintiff.

93. *Id.* art. 61; *see supra* note 81.

94. *Id.* art. 63:

A. Statements by a witness shall be entered in the record or the investigation without any erasures, crossings out, amendments or additions to the text, which when complete shall be read through and signed by the witness, or if the witness cannot read shall be read out to him and then signed by the person who entered it in the record. No correction or alteration shall be accepted unless signed both by the investigative judge or [judicial] investigator and by the witness.

B. The accused and the other parties may make observations on evidence given and may ask for a witness to be questioned again, or for other witnesses to be questioned about other facts to which they refer, unless the investigative judge considers that a response to the request would be impossible or impracticable or would delay the investigation unjustifiably or would pervert the course of justice.

95. *Id.* art. 66:

If so requested by a witness the investigative judge shall assess the travel expenses and other necessary expenditure incurred by the witness, as well as any wages he has been deprived of, as a result of his attendance away from his normal place of residence, and shall order their reimbursement from Treasury funds.

96. *Id.* art. 67:

If the witness is ill or if there is anything else which prevents him from attending then the investigative judge or [judicial] investigator shall go to the witness's current place of residence in order to receive and record his evidence.

propounded to the witness.[97] Furthermore, equal in importance to the substance of the witness' testimony[98] is the IJ's assessment of the witness' credibility.[99]

Most interestingly, oral testimony is not presented seriatim in the type of individual-witness question-and-answer format used in American courts; rather, witness testimony is more conversational (albeit potentially confrontational).[100] The conversational nature of the testimony goes beyond a witness' own observations of fact—to include observations about other evidence and even asking or suggesting that other witnesses be summoned.[101] The only real limits on witness testimony are that (1) all questions must be vetted through the IJ, and (2) a witness' statement can be curtailed if it is irrelevant or offensive.[102]

Throughout this process, an accused is, of course, entitled to representation by a retained or appointed defense attorney.[103] However, the Code does not identify any specific role the defense bar is to play.

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97. *Id.* art. 64:

> A. No question may be addressed to a witness without the permission of the investigative judge or [judicial] investigator and no questions may be put to a witness that are not relevant to the case or which impinge upon others. A witness may not be addressed in a declaratory or insinuating manner and no sign or gesture may be directed at him that would tend to intimidate, confuse or distress him.
>
> B. A witness may not be prevented from giving evidence that he wishes to give and may not be interrupted while giving it, unless he speaks at undue length on matters not relevant to the case or on matters that impinge on others, offend common decency or infringe security.

98. *See infra* text accompanying notes 113-115 (noting that the IJ actually writes the summary of testimony, highlighting or downplaying facts as the IJ, in his sole discretion, deems appropriate).

99. Criminal Procedure Code, art. 65:

> The investigative judge or [judicial] investigator must note in the record of the investigation anything he observes about a witness that may affect his fitness to give evidence or to sustain the process of giving evidence because of his age or physical, mental or psychological condition.

100. *Id.* art. 62:

> The evidence of each witness shall be heard separately but witnesses may confront each other and the accused.

101. *Id.* art. 63(B):

> The accused and the other parties may make observations on evidence given and may ask for a witness to be questioned again, or for other witnesses to be questioned about other facts to which they refer, unless the investigative judge considers that a response to the request would be impossible or impracticable or would delay the investigation unjustifiably or would pervert the course of justice.

102. *Id.* art. 64; *see also supra* note 97.

103. *Id.* art. 144:

> A. The Head of the Court of Felony appoints a [sic] attorney for the accused in felonies if he has not appointed one and the court sets remuneration for the lawyer during judgment on the case. The decision to appoint the representative is considered an order of delegation. If the attorney can demonstrate a legal excuse for not accepting the brief, then it is for the head of the court to appoint an alternative [sic] attorney.
>
> B. The appointed attorney must prepare the submission and defend the accused, or be replaced by an appointed attorney, with the court imposing a fine

The IJ's role in the judicial process ends in one of three ways: he dismisses the case with prejudice,[104] he closes the case temporarily due to lack of evidence or because the perpetrator cannot be identified (or, interestingly, because the incident was an act of God),[105] or he finds sufficient evidence that a crime has been committed and that this accused committed the crime—in which case he binds the accused over for trial.[106] The IJ prepares a formal dossier with summaries of all witness testimony and the statement of the accused, as well as an executive summary describing the relevant details of the case.[107]

D. Pretrial Investigation—The Initial Judicial Phase, As Observed

Each opportunity I had to witness an Iraqi court proceeding[108] created lasting impressions. First, was the indelicate ballet of shuffling prisoners—marched from buses to holding cells, then to the IJ's chambers—dressed in sandals and brightly-colored jumpers. In the morning, there would be a line marching into the building, the continuity broken occasionally by an amputee hobbling in on crutches or being carried in by his fellow detainees. Their overseers orchestrated their movements at

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> implemented by a memo written by the head of the court to the department of implementation, without violating the procedural rules of the court, in accordance with the Law of Lawyers. He shall be exempt from the fine if at any time it is proved that he was excused from attending the session in person or through a representative;

see also supra note 17; *infra* Section II.E.7. Defense counsel issues (discussing defense counsel roles and issues).

104. Criminal Procedure Code, art. 130(A):

> If the investigative judge finds that the action is not punishable by law or that the complainant has withdrawn the complaint, or that the offence is one over which he has no authority without reference to the judge, or that the accused is not legally responsible because he is a minor, he issues a decision rejecting the case and closing the case file definitively.

105. *Id.* art. 130(B)-(C):

> B. If the act is punishable by law and the investigative judge finds that there is sufficient evidence for a trial, a decision is issued to transfer the accused to the appropriate court. If there is insufficient evidence he is not transferred, an order is issued for his release and the case file is closed temporarily, with a statement containing the reason for the closure.
>
> C. If the investigative judge finds that the perpetrator is unknown or that the incident was an act of God, he issues a decision to close the case temporarily.

106. *Id.* art. 130(B).

107. *Id.* art. 131:

> A decision of transfer should list the name of the accused, his age, profession, place of residence and the offence of which he is accused as well as the time and date of its occurrence and the Article of law which applies, the name of the victim and the evidence obtained, along with the date of issue of the decision, signed by the investigative judge and stamped by the court.

108. I readily admit that my personal observations may not be at all representative of the criminal justice system as it occurs in the court systems that have been extant throughout Iraq since the original adoption of the Criminal Procedure Code. The totality of my observations of investigative hearings occurred at the main (Al Karkh) branch of the Central Criminal Court of Iraq (CCCI), while all of my observations of trial hearings were at the Rusafa Branch of the CCCI. The relevant players were Iraqis, but the forum was a Coalition creature. Nevertheless, I am confident that the process is not *significantly* different elsewhere.

every phase—first to the dusty holding cells, then to the internal hallways adjacent to the IJs' chambers to await the calling of their case. The courthouse almost had an atmosphere of a crowded marketplace. When their case was called, they would be ushered into the office. The IJ would sit at his large desk, which was situated in such a way that it was obvious to all present that this was his show.

The Al Karkh facility processed all criminal cases investigated and presented by Task Force 134, the Coalition unit tasked with processing persons captured by MNF-I forces. An initial review process determined whether the MNF-I detainees should be released to the Iraqi criminal justice process or held indefinitely as Coalition security internees—either because they were a potential source of ongoing actionable intelligence or because they were deemed a persistent threat, but there was insufficient releasable (unclassified) information to use against them in a criminal prosecution.[109] Those released to Iraqi authorities were processed in the new CCCI court system, with Iraqi judges applying Iraqi law.

The investigative hearing was an intimate setting. It was rare to have more than seven or eight people in the room, including the IJ, his recorder (judicial investigator?), the accused, the prosecutor (usually played by a U.S. military lawyer), a defense counsel, a translator or two for the U.S. military members present, a few witnesses—usually U.S. military members who had arrested the individual while on patrol—and maybe an observer or two (like me). Only on rare occasions did the defense counsel say a word during the entire hearing. Whereas one (male) Iraqi witness might be considered sufficient to establish a case ready to move forward (providing the accused confessed[110]), it was understood (maybe even a policy) that Iraqi IJs would not accept the testimony of just one U.S. military witness in any case—no matter how many photographs, diagrams, or other pieces of evidence there might be.

Task Force 134 apparently had a working relationship with the Public Prosecutor's Office at CCCI whereby military attorneys were deputized as "Special Prosecutors",[111] although they were obviously not Prosecutors under Iraqi law—not having been to the Judicial Institute nor falling under the Office of Public Prosecution. Although the Code does not really envision any participation by the Public Prosecutor during the investigative phase,[112] the Prosecutor does,

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109. Criminal Procedures, CPA Memorandum No. 3 of 2003 (Iraq), § 7, *available at* http://www.ictj.org/static/MENA/Iraq/iraq.cpamemo3.062704.eng.pdf.

110. Criminal Procedure Code, art. 213(B):

> One testimony is not sufficient for a ruling if it is not corroborated by background information or other convincing evidence or an admission from the accused. The exception to this rule is if the law specifies a particular way of proving a case, which must be followed;

see also infra text accompanying notes 280-283.

111. This assertion is made based on a variety of Task Force 134 documents in the possession of the author.

112. Criminal Procedure Code, arts. 40(A), 43, 46, 47(A), 84 (enumerating the duties of the Public Prosecutor); *see also* Public Prosecution Law No. 159 of 1979 (Iraq); *supra* text accompanying notes 39-44. The involvement of the Public Prosecutor's Office in any particular criminal case is fairly superficial until a formal trial is called. The Public Prosecutor is available as a sort of Inspector General

nevertheless, have an institutional interest in monitoring developments in each case to ensure compliance with law and procedure. It was my experience that the military attorneys' participation was limited to preparing military witnesses for the hearing and accommodating their presence. It was rare that the attorneys were allowed to question a witness directly. Instead, depending on the indulgence of the IJ, they often had to request or suggest that the judge question the accused on a certain point to try to bring out some fact the attorney considered relevant. The judge might ask the question just as the attorney had suggested, he might reword it, or he might not ask it at all.

To me, the most striking aspect of the investigative hearing was that the dossier prepared and submitted by the IJ did not seem to contain any primary evidence.[113] Instead, the IJ would dictate a summary of each witness' testimony, as well as a review of all diagrams and photographs mentioned during the hearing. The IJ's recorder (perhaps his judicial investigator?) would sit at the corner of his desk and transcribe his dictation in longhand onto blank sheets of paper—making a simultaneous file copy by use of carbon paper slid between two sheets of paper held by a binder clip (reportedly an Iraqi practice in all walks of life). It was this handwritten dictation that became the case file forwarded to the trial court.

The Iraqi judiciary apparently has a saying that "the confession is the master of evidence."[114] The IJ's true power is most poignant in the surprisingly-large majority of cases where there is a confession. On the one hand, confessions were transcribed in the same quotidian way as the IJ's executive overview of the entire case and other witness statements. On the other hand, it was in fact the IJ's terminology, not the accused's, that was ultimately adopted as the confession. I witnessed more than one IJ dictate his version of the confession and even get in sidebars—sometimes involving some amount of obvious disagreement—with the accused over just how the facts should be portrayed. In the end, the accused would adopt the statement and affix to it his mark or signature.

The foregoing practice was in sharp contrast to the level of acceptance by the IJ and trial judges alike with respect to extrajudicial confessions. Even though the Coalition forces had an extensive training program to ensure that their police patrols thoroughly documented the crime scene with photographs, diagrams, and tape recordings,[115] the judges appear chary of accepting any confessions made to the police/military agents who effected the arrest. The judges feel a strong need to witness the confession themselves (and perhaps to massage it in their own verbiage). Accordingly, such out-of-court confessions typically hold little to no weight.

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to ensure that the investigators and judges properly adhere to legal requirements. *But see* Amendment to the Law of Public Prosecution No. 159 of 1979, Law No. 15 of 1988(Iraq), art. 2.; *supra* note 44 and accompanying text (Public Prosecutor is entitled to attend investigative hearings).

113. *See supra* text accompanying notes 81-85.

114. Interview with Al-Maliki, *supra* note 18.

115. *See* Rita Boland, *Battlefield Crime Scene Investigators Gather Evidence to Stop Terrorists*, SIGNAL, Nov. 2009, at 34, *available at* http://www.afcea.org/signal/articles/templates/SIGNAL_Article_Template.asp?articleid=2104&zoneid=54.

E. Special Issues Under the Code

The Iraqi Criminal Procedure Code addresses a variety of issues that are not part of the investigation and trial process *per se*, but have significant bearing on them.

1. Searches and Seizures[116]

The rules regarding searches of persons or places are not unlike American Fourth Amendment jurisprudence.[117] For example, although government officials looking for evidence of a crime may not search a person or place without prior authorization,[118] the IJ's authority in ordering searches is quite broad.[119]

As in other areas of the law, the legal standard for the investigative judge is hazy: he simply must have reason (probable cause?) to believe that useful evidence will be found which will shed light on the investigation.[120] If necessary, authorities

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116. I was never in a position to witness a field investigation, so I cannot offer any observations of whether praxis differs from theory. I can say, however, that the investigative hearings and trials I observed did not seem to utilize any seized items as evidence—relying, instead, on witness statements, photographs, and pictures drawn by the witness at the scene. To my recollection, I never observed any discussion of an objection to any search or seizure.

117. *See* Article 17, Section 2, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005:

> The sanctity of the homes shall be protected. Homes may not be entered, searched, or violated, except by a judicial decision in accordance with the law.

118. Criminal Procedure Code, art. 72(A):

> The searching or any person or entry of any house or any business premises for the purposes of a search are not permitted other than in cases stipulated by law;

see also id. art. 73(A):

> The searching of any person or entry of a house or other business premises for the purpose of a search is not permitted unless based on an order issued by the competent legal authority.

119. *See id.* art. 70:

> The investigative judge or [judicial] investigator may compel the plaintiff or accused in a felony or misdemeanour case to cooperate in physical examination or the taking of photographs, or through fingerprinting or analysis of blood, hair, nails, or other items for the purposes of the investigation. Physical examination of a female should be conducted by another female.

120. *Id.* art. 74:

> If it appears to the investigative judge that a particular person is holding items or papers which would inform the investigation, he may issue a written order for the items to be submitted. If he believes that the order will not be obeyed or is worried that the items will be removed, he may conduct a search procedure in accordance with the paragraphs below;

see also id. art. 75:

> The investigative judge may order the searching of any person or house or any other place owned by the person accused [of] committing an offence if the search may reveal the presence of documents, weapons, tools or persons who have had a part in the offence or are held against their will;

id. art. 76:

> If it appears to the investigative judge, based on information or an indication, that a residence or other place is being used to keep stolen money, or that it contains items involved in an offence, a person who is being held against his will or a person who has committed an offence, he may order the search of that location

may use force to effectuate a search.[121] On the other hand, despite a seeming lack of standards regarding the level of suspicion required to justify a search, searches are theoretically conducted under the aegis of an investigative judge. Thus, although there are no legal standards set forth in the Code, they are likely discussed both in law school and at the Judicial Institute. It should also be noted that there is a panoply of rights reminiscent, and perhaps more protective, of individual concerns than in American jurisprudence:

- The police may not deviate from the scope of the authorization.[122]
- The search authorization requirement extends even to areas outside the control of the accused—where an American suspect would not have standing to contest the search.[123]
- The default rule is that searches take place in the accused's presence; furthermore, impartial witnesses observe the search to safeguard against police impropriety.[124]
- Notwithstanding the lack of a specific requirement to maintain a

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and take legal measures in relation to the money or persons, whether or not the location is owned by the accused;

id. art. 77:

> The person undertaking the search may search any individual at the search site on the basis that such individual may be hiding something for which the search is being conducted.

Note that Article 77 was not included in any of the original English translations of the Criminal Procedure Code. It is now extant in the GJPI version. *See supra* note 1.

121. Criminal Procedure Code, art. 81:

> The person to be searched, or whose property is to be searched, in accordance with the law, must allow the persons searching to perform their duty. If he prevents the search, the person undertaking the search must carry it out through the use of force or may request police assistance.

122. *Id.* art. 78:

> A search is not permissible except when looking for the items to which the search relates. If the search reveals the existence of another item indicating an offense, it may be seized.

123. There must be an authorization to search not only the person or real property owned by an accused, *see* Criminal Procedure Code, art. 75; *see supra* note 120 and accompanying text, but locations *not* owned by the defendant as well. *See* Criminal Procedure Code art. 76; *see also supra* note 120 and accompanying text.

124. Criminal Procedure Code, art. 82:

> The search should take place in the presence of the accused and the owner of the house or place of business, if appropriate, and in the presence of 2 witnesses, along with the mayor or his appointee. The person conducting the search is to prepare a record in which are recorded the procedures and time of the search along with the location, items seized with descriptions, names of those present in the location as well as a note of the accused and those connected with the case and the names of witnesses. This record should be signed by the accused, the owner of the place, the person who carries out the search and those present. Any refusal to sign should be noted in the record. The accused should be given a copy or [sic] the record on request, as may those connected to the case, and copies of letters or documents should be given to their owners, if that is not detrimental to the investigation.

chain-of-custody paper trail,[125] the Code has direct safeguards against evidence tampering.[126]

- Personal privacy considerations even extend to personal effects.[127]
- Female body searches must be conducted by other females.[128]
- Suspects may even raise objections during the course of the search[129]

Iraqi law also recognizes some of the same types of exceptions to the warrant/order requirement:

- Emergency circumstances entry[130]
- Plain view seizure[131]
- Search incident to arrest[132]

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125. *See id.* art. 42; *see also supra* note 70 and accompanying text.

126. *Id.* art. 83:

> The person carrying out the search must place seals on all locations and items containing evidence needed for the investigation, which should be protected. It is not permissible to break this seal except by order of the investigative judge and in the presence of the accused and owner of the property and the person who checked the goods. If one of them is unable to attend or send a delegate, it is permissible to break the seal in his absence.

127. *Id.* art. 84:

> A. If, amongst the articles in the location being searched, there are letters, documents or other personal items, it is not permissible for anyone to read them other than the person conducting the search, the investigative judge, the [judicial] investigator and a representative of the Public Prosecutor.
>
> B. If the items seized are papers which have been sealed in any way, it is not permissible for any person other than the investigative judge or the investigator to open them and read them. This reading should take place in the presence of the accused and those connected with the location. If the papers have no connection with the case, they should be returned to the owner and not made public.

128. *Id.* art. 80:

> If a female is to be searched, the search must be conducted by a female appointed for the purpose, with the identity or [sic] the searcher being recorded in the record;

see also id. art. 70:

> Physical examination of a female should be conducted by another female.

129. *Id.* art. 86:

> Objections to the search procedures should be submitted to the investigative judge who must make a quick decision.

130. *Id.* art. 73(B):

> It is permitted to search any location without prior permission in the event of a request for assistance from a person inside the location, or in the case of fire, drowning or other similar case of necessity.

131. *Id.* art. 78:

> If the search reveals the existence of another item indicating an offense, it may be seized.

132. *Id.* art. 79:

- Exigent circumstances search[133]
- Weapons pat-down[134]

Finally, it is worth noting that the Iraqi Penal Code,[135] the main source of substantive criminal law in Iraq, makes it a crime for public officials to enter a home to conduct a search without consent or proper authorization.[136]

2. Compulsory Appearance—the Summons[137]

At any time during the fact-gathering phase, the official may issue a summons to any person with knowledge of the case.[138] The summons is prepared in duplicate and signed by the process server and the recipient, with each receiving a

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> The [judicial] investigator or crime scene officer may search the person arrested in cases in which the arrest is permitted by law. In the event of the deliberate commission of a felony or misdemeanor [sic] which has been witnessed, he may inspect the house of the accused, or any place in his possession, or seize persons, papers or items which inform the investigation if there is a strong indication of their presence.

133. *Id.* art. 85:

> Any person conducting a search outside the area of jurisdiction of the judge who issued it, must, before the search is carried out, refer to the investigative judge of the area in which the place to be searched is located. In urgent cases he may carry out the search immediately and then inform the investigative judge of the area.

134. *Id.* art. 107:

> Anyone who arrests someone in accordance with the law must take from him any weapons he is carrying and hand them over immediately to the person issuing the arrest warrant or to the nearest police station or to any member of the police.

135. Penal Code No. 111 of 1969 (Iraq), *available at* http://law.case.edu/saddamtrial/documents/Iraqi_Penal_Code_1969.pdf. The author is not aware of an English translation of the Code being published in the English version of The Iraqi Gazette, but this version appears to be an official translation commissioned by the Iraqi Ministry of Justice.

136. *Id.* ¶ 326:

> Any public official or agent who, in the course of his official duty, enters the house of a person or any part thereof without the consent of that person or causes another to enter the house in circumstances other than those in which the law sanctions such entry or without due care to the procedures laid down for making such entry is punishable by detention plus a fine or by one of those penalties.
>
> The same penalty applies to any public official or agent who carries out a search of a person, house or location without the consent of the owner or causes another to carry out the search in circumstances other than those in which the law sanctions such search or without due care to the procedures laid down for such search.

137. As with searches and seizures, I had no opportunity to observe the summons process either in action or being discussed during a judicial hearing.

138. Criminal Procedure Code, art. 87:

> The court, investigative judge, [judicial] investigator or policeman in charge of a police station may issue a summons to the accused or to a witness or to anyone connected with the case. There should be two copies of the document on which are recorded the person issuing the summons and the person summoned, along with their place of residence, the time and place of the requested attendance, the type of offense being investigated, and the legal paragraph on which it is based.

copy.[139] In cases where the recipient refuses to sign or cannot sign (due to illiteracy?), a witness can sign the documents attesting to their delivery.[140] Personal service of a summons is not required: if it is known that the witness is in-country, the summons may be served on a spouse, close relative, or coworker.[141] In fact, if no one is available to accept service of process, the summons may simply be affixed to the recipient's door, with the server and witnesses attesting to the posting.[142] If the witness is in-county but outside the jurisdiction of the official issuing the summons, the server can send it to a process server who has jurisdiction in the witness' location.[143] If the witness is outside Iraq, service is accomplished by mail using the same procedures used in civil cases.[144] A witness who presents to the investigative judge without being summoned must submit a written pledge to appear when requested.[145] This places the individual under the same legal requirement to appear as a person summoned. In consequence, failure to appear is a basis for the issuance of an arrest warrant.[146]

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139. *Id.*; *see also id.* art. 88:

> The person summoned notes the contents of the summons and signs the original document with his signature or finger print. The other copy is handed to him and an indication is made on the original document that notification has been carried out, which includes a statement of the time and date of notification. If the person summoned will not accept the summons or is unable to sign, the person tasked with notification must ensure that he is informed of the contents in the presence or [sic] witnesses, and leave him the other copy, after noting this on both copies, followed by his signature and those of the witnesses.

140. *Id.* art. 88.

141. *Id.* art. 89(A):

> If the person summoned is not present in his home or place of work and it is found that he is present in the country, the summons can be presented to his spouse, other relatives or relatives by marriage living with him, a person working for him or an employee at his place of work, who should sign the original copy and pass him the copy. If he does not, or cannot, sign, the procedures given in Article 88 above should be followed.

142. *Id.* art. 89(B):

> If the person tasked with notification does not find any of the persons mentioned above, he pins a copy of the paper on the outer door of the residence or place of work, after signing in front of witnesses, explaining the steps taken on both the copy and the original.

143. *Id.* art. 91:

> A summons to a person outside the geographical jurisdiction of the authority issuing that summons is sent to a [sic] authority within the geographical jurisdiction for notification in accordance with the rules stated above.

144. *Id.* art. 90:

> The notification of persons outside Iraq and of corporate bodies is done through use of a written summons in accordance with the procedures outlined in the Code for Civil Procedures.

145. *Id.* art. 96:

> If a person who should have had a summons or arrest warrant issued against him, appears before the judge or [judicial] investigator, the judge must ask him for a written pledge, with or without bail, saying that he will attend at the required time. If he does not attend, and does not have a legal excuse, the judge must issue an arrest warrant.

146. *Id.* art. 97:

3. Arrest and Detention

The Iraqi Criminal Procedure Code, consistent with the overarching theme of the investigative judge leading the charge to determine whether and by whom a crime has been committed, envisions an orderly process where an arrest is authorized by the investigative judge only once the investigation has progressed sufficiently to identify a suspect. In fact, the default position in the Code is that arrests must be effectuated pursuant to a judge-issued warrant,[147] barring other legal authority.[148] The warrant specifically identifies the suspect and the general nature of the crime he is accused of committing.[149] Unlike summonses, which are issued for witnesses or petty criminals,[150] arrest warrants are not limited by the

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If the person does not attend after being summoned, without a legal excuse, or if there is a fear that he will abscond or influence the investigation, or if he does not have a specific place of residence, the judge may issue a warrant for his arrest.

147. *Id.* art. 92:

Arrest or apprehension of a person is permitted only in accordance with a warrant issued by a judge or court or in other cases as stipulated by the law.

148. *See id.* art. 102:

A. Any person may arrest any other person accused of a felony or misdemeanor without an order from the authorities concerned, in any of the following cases:

i. If the offence was committed in front of witnesses.

ii. If the person to be arrested has escaped after being arrested legally.

iii. If he has been sentenced in his absence to a penalty restricting his freedom.

B. Any person may, without an order from the authorities concerned, arrest any other found in a public place who is in a clear state of intoxication and confusion and has created trouble or has lost his reason;

see also id. art. 103:

Any policeman or crime scene officer must arrest any of the following if they encounter them:

i. Any person against whom an arrest warrant has been issued by the competent authorities;

ii. Any person carrying arms, whether openly or concealed, violating the provisions of law;

iii. Any person thought, based on reasonable grounds, to have deliberately committed a felony or misdemeanor and who has no particular place of residence;

iv. Any person who impedes a member of the court or public official from carrying out his duty.

149. *Id.* art. 93:

The arrest warrant should contain the full name of the accused, with his identity card details and physical description if these are known, as well as his place of residence, his profession, and the type of offence to which the warrant relates, the legal provision which applies and the date of the warrant. It should be signed and stamped by the court. In addition to the details given, the warrant should contain an instruction to members of the police force to arrest the accused, by force if he will not come voluntarily.

150. *See id.* art. 99:

In the case of an offence punishable by a period of detention exceeding one year, the accused is called to attend by the issue of an arrest warrant against him, unless the judge sanctions the issue of a summons. However, the issuing of a summons for an offense punishable by death or life imprisonment is not

judge's jurisdictional limits and thus are enforceable throughout the entire country.[151]

Police or court officers have authority to make warrantless arrests under a variety of specified circumstances.[152] Citizen's arrest is also authorized.[153] Force (apparently including lethal force in cases where the alleged offense merits the death penalty) may be used to enter a place to accomplish an arrest or to subdue a person being arrested.[154]

The orderly process anticipated by the Code is that the accused is presented to the investigative judge for initial questioning[155] within twenty-four hours of arrest.[156] Following this interrogation, the judge determines whether the arrestee

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permitted.

151. *Id.* art. 94:

> A. The arrest warrant is valid in all areas of Iraq and must be executed by anyone to whom it is sent. It remains current until it has been executed or cancelled by the party issuing it or by a higher authority with legal right to do so.
>
> B. The wanted person must be informed of the warrant which has been issued for his arrest and be brought before the party who issued the warrant;

but see id. art. 100:

> If the arrest warrant is to be executed outside the area of jurisdiction of the judge who issued it, the person charged with its execution should present it to the appropriate judge in the area for permission to execute it, unless he believes that the opportunity to arrest the person will be missed;

see also id. art. 101:

> A. If the arrest warrant is executed outside the jurisdiction of the judge who issued it, and if there is no permission to release the accused by pledge or bail as stipulated in Article 95, the judge must detain him and send him under escort to the judge who issued the warrant.
>
> B. If the bail put forward by the accused is not accepted, or if he is unable to make the pledge as stipulated in Article 95, the judge must detain him and send him under escort to the judge who issued the warrant.

152. *See id.* art. 103; *see supra* note 148 and accompanying text.

153. See *id.* art. 102; *see supra* note 148 and accompanying text.

154. *Id.* art. 105:

> Any person who is sent an order to arrest someone, and any person charged with making an arrest in a witnessed offence must pursue the accused in order to arrest them, and if the presence of the accused is in doubt, or he hides somewhere, persons in that place should be asked to hand him over or to offer all possible facilities to enable his arrest. If this is not allowed, the person making the arrest must enter this place or any place in which the accused has taken refuge, by force, in order to arrest him;

see also id. art. 108:

> If the accused resists arrest or tries to escape, the person arresting him in accordance with the law may use reasonable force to enable him to carry out the arrest and to move him without allowing him to escape, provided that this does not lead to the death of anyone who has not committed an offense for which the death penalty or life imprisonment is prescribed.

155. For discussion of the right against self-incrimination, *see infra* Section II.E.8. Self-incrimination.

156. Criminal Procedure Code, art. 123(A):

> The investigative judge or [judicial] investigator must question the accused within 24 hours of his attendance, after proving his identity and informing him of

should be detained and for how long. The Code prescribes a range of pretrial-restraint time periods, depending on the punishment prescribed for the crime of which the person is accused:

- Death penalty cases: the judge may order the accused to be held indefinitely.[157]
- Crimes punishable by up to three years detention, imprisonment for a term of years, or life imprisonment: the judge may order successive fifteen-day periods, but may release either on bail[158] or on a written pledge to appear.[159]
- Crimes punishable by no more than three years of detention or a fine: the judge must order the release of the accused unless "he considers" that such release will frustrate justice.[160]
- Persons accused of mere "infractions": no pretrial restraint may be imposed unless the person is homeless.[161]

Under all of the foregoing circumstances, detention should not exceed one-quarter of the maximum potential sentence, and in no case longer than six months; the criminal court must approve any detention beyond six months and may not approve any detention longer than one-quarter of the maximum potential sentence.[162] Detention is meant to be a temporary status[163]—*i.e.*, a person is to be

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the offence of which he is accused. His statements on this should be recorded, with a statement of evidence in his favour. The accused should be questioned again if necessary to establish the truth.

157. *See id.* art. 109(B):

If the person arrested is accused of an offence punishable by death the period stipulated in sub-paragraph (A) may be extended for as long as necessary for the investigation to proceed until the investigative judge or criminal court issues a decision on the case on completion of the preliminary or judicial investigation or the trial.

158. Bail issues regarding amounts, handling of funds, and seizure of personal property to satisfy debts to the court are set forth in Criminal Procedure Code, arts. 114-122.

159. *Id.* art. 109(A):

If the person arrested is accused of an offence punishable by a period of detention not exceeding 3 years or by imprisonment for a term of years or life imprisonment, the judge may order that he be held for a period of no more [than] 15 days on each occasion or order his release on a pledge with or without bail from a guarantor, and that he attend then requested if the judge rules that release of the accused will not lead to his escape and will not prejudice the investigation.

160. *Id.* art. 110(A):

If the person arrested is accused of an offence punishable by a period of detention of 3 years or less or by a fine, the judge must release him on a pledge with or without bail unless he considers that such a release will obstruct the investigation or lead to the accused absconding.

161. *Id.* art. 110(B)

If the person arrested is accused of an infraction, he may not be held unless he has no particular place of residence.

162. *Id.* art. 109(C):

The total period of detention should not exceed one quarter of the maximum permissible sentence for the offence with which the arrested person is charged

held only so long as is necessary to conduct the investigation.[164] If a detainee is exonerated, he is to be released immediately.[165]

The foregoing plethora of specific provisions in the Iraqi Criminal Procedure Code is bolstered by a variety of others elsewhere in Iraqi law. For example, the post-Saddam Hussein Iraq Constitution provides a number of references to minimum standards regarding treatment of criminal suspects. Starting from the idealized concepts that human dignity is to be "protected,"[166] that the accused is presumed innocent until proved guilty,[167] and that individuals have the right to be treated with justice in all judicial proceedings,[168] the Constitution specifically prohibits "unlawful detention."[169] The Constitution also goes so far as to specify that "no person may be kept in custody or investigated except according to a judicial decision"[170] and that preliminary investigative documents must be submitted to an IJ within twenty-four hours of "arrest"—this period being extended at most only once for an additional twenty-four hours.[171] All persons

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and should not, in any case, exceed 6 months. If it is necessary to increase the period of detention to more than 6 months, the judge must submit the case to the Felony Court to seek permission for an appropriate extension, which must not itself exceed one quarter of maximum permissible sentence, or he should order his release, with or without bail, under the terms of sub-paragraph (B).

163. *But see* Modifications of Penal Code Proceedings Law, CPA Order No. 31 of 2003 (Iraq), § 6 : Notwithstanding the bail provisions contained in Paragraph 109 of the Criminal Proceedings Law No. 23 of 1971 the reviewing judge may order a person suspected of committing an offense punishable by life imprisonment to be held without bail until trial.

164. Criminal Procedure Code, art. 111:
The judge who issued the decision to detain the accused may decide to release him on a pledge, with or without bail, before the end of the period of detention stipulated in sub-paragraph (B) of Article 109, and he may return him to the holding detention if necessary for the investigation.

165. *Id.* art. 130(D):
An accused who has been detained will be released once the decision to reject the case or to release him has been issued.

166. Article 37, Section 1(A), Doustour Joumhourait al-Iraq [The Constitution of the Republic of Iraq] of 2005:
The liberty and dignity of man shall be protected.

167. *Id.* Article 19, Section 5:
The accused is innocent until proven guilty in a fair legal trial. The accused may not be tried for the same crime for a second time after acquittal unless new evidence is produced.

168. *Id.* Article 19, Section 6:
Every person shall have the right to be treated with justice in judicial and administrative proceedings.

169. *Id.* Article 19, Section 12(A):
Unlawful detention shall be prohibited.

170. *Id.* Article 37, Section 1(B):
No person may be kept in custody or investigated except according to a judicial decision.

171. *Id.* Article 19, § 13:
The preliminary investigative documents shall be submitted to the competent judge in a period not to exceed twenty-four hours from the time of the arrest of

accused of felonies or misdemeanors have a constitutional right to court-appointed defense counsel[172] and to present a defense in all phases of investigation and trial.[173]

The Iraqi Penal Code[174] actually enumerates several crimes applicable to government officials who violate a suspect's rights regarding detention:

- It is a crime to arrest, detain, or imprison any person in circumstances other than those stipulated by law.[175]
- It is a crime for detention facility and prison officials to accept prisoners without a valid detention or imprisonment order.[176]
- It is a crime to willfully fail to execute the duties of one's office[177] or to commit an act in breach of one's duties with intent to harm the welfare of an individual.[178]
- It is a crime to maltreat a private citizen, causing him to suffer a loss of esteem or dignity or to experience physical pain.[179]

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the accused, which may be extended only once and for the same period.

172. *Id.* Article 19, § 11:
The court shall appoint a lawyer at the expense of the state for an accused of a felony or misdemeanor who does not have a defense lawyer.

173. *Id.* Article 19, Section 4:
The right to a defense shall be sacred and guaranteed in all phases of investigation and the trial.

174. Criminal Procedure Code No. 23 of 1971, art. 107; *see supra* note 134.

175. Penal Code No. 111 of 1969 (Iraq), art. 322, *available at* http://law.case.edu/saddamtrial/documents/Iraqi_Penal_Code_1969.pdf:
Any public official or agent who arrests, imprisons or detains a person in circumstances other than those stipulated by law is punishable by a term of imprisonment not exceeding 7 years or by detention. The penalty will be a term of imprisonment not exceeding two years or detention if the offence is committed by a person wearing an official uniform to which he is not entitled or who uses a false identity or makes use of a counterfeit order claiming it to have been issued by an authority that is entitled to issue such orders.

176. *Id.* art. 324:
Any public official or agent who is entrusted with the administration or supervision of a centre, prison or other institution set aside for the discharging of a penalty or precautionary measure and who admits a person without an order to do so from a competent authority or refrains from implementing an order issued for the release of such person or for his continued detention following the period prescribed for his custody, detention or imprisonment is punishable by detention.

177. *Id.* art. 330:
Any public official or agent who unlawfully refrains from executing the duties of his office or wilfully [sic] fails to fulfil [sic] his duties in response to a request or instruction or to mediation by another or for any unlawful reason is punishable by detention.

178. *Id.* art. 331:
Any public official or agent who wilfully [sic] commits an act in breach of the duties of his office or refrains from executing the affairs of that office with intent to harm the welfare of an individual or to benefit one person at the expense of another or at the expense of the state is punishable by detention plus a fine or by one of those penalties.

In sum, legal authorities abound for ensuring that no individual is held longer than appropriate. Unfortunately, as noted in the next section, a disconnect exists between black-letter law and reality.

4. Arrest and Detention, Some Observations[180]

Arrest and detention truly deserve their own treatment as they literally became an issue of overwhelming importance. In 2007, my task force was created, in part, to try to address the issue of the large number of detainees—some four to five thousand—being held at Rusafa Prison on the outskirts of Baghdad. This group was a mix of unfortunate souls: most were in pretrial detention and had been there for two or three years without having seen a judge. Some of them were accused of crimes whose maximum potential sentences were less than the time they had spent in detention; some had actually been through the judicial process and were either acquitted or deemed releasable due to insufficient evidence. The prison was literally bursting at its seams, and officials were scrambling to create a permanent tent city in the adjacent field to relieve the pressure.

A number of causes exist for the overcrowding problem: the religious prejudices of judges who were ill-inclined to release an individual not of the judge's own religious persuasion; the dismal state of security at courthouses, which directly impacted the number of hours judges dared to work; and the successes of the Coalition-backed patrols, which apprehended accused terrorism suspects in large numbers.[181] However, perhaps the biggest culprit was the all-entrance, no-exit nature of the detention system: judges simply had no realistic incentive to release prisoners. This, in turn, was a function of the process in which detainees entered the system.

Most on-scene criminal investigations are conducted by Ministry of Interior (MOI) personnel—either Iraqi National Police, Iraqi Police, or investigators from the MOI Criminal Investigations Division (CID).[182] Many police precincts, at least

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179. *Id.* art. 332:

> Any public official or agent who cruelly treats a person in the course of his duties thereby causing him to suffer a loss of esteem or dignity or physical pain is punishable by a period of detention not exceeding 1 year plus a fine not exceeding 100 dinars or by one of those penalties but without prejudice to any greater penalty stipulated by law.

180. This paper will not address the collateral issue of security detainees—*i.e.*, those persons seized by coalition forces following the 2003 occupation of Iraq. A review process was created to determine whether such individuals should be released to civilian authorities to be prosecuted for their crimes under substantive Iraqi criminal law—including the provisions of the well-used Anti-Terrorism Law No. 13 of 2005 (Iraq), promulgating a capital offense of "terrorist acts"—or whether they should be retained by coalition forces and held indefinitely without charge—either because they were deemed to be a potential source of valuable intelligence or they were deemed a security risk but there was insufficient releasable (read unclassified) information to secure their conviction in an Iraqi tribunal. *See* Criminal Procedures, CPA Memorandum No. 3 of 2003 (Iraq), §§ 5-6 (providing specific substantive and procedural rights for criminal detainees and MNF Security Internees).

181. Interview with Colonel Mazin and Captain Hayder, Officials with MOI Records Department,in Baghdad, Iraq (Oct. 2007- Nov. 2007).

182. *Id.*

in Baghdad, have resident investigative judges (or close access to a judicial facility) who can issue arrest warrants on short notice. MOI personnel thus bring the individuals arrested into the system, and their case file is created at the local level. The MOI personnel eventually transfer them to a regional holding facility before ultimately passing them to the custody of the Ministry of Justice (MOJ), which owns both the courts and the prisons. The case file, however, is transferred to one of the two main police General Directorates in Baghdad—al-Karkh and al-Rusafa.[183]

It appears that the MOJ apparatus does not have accurate copies of the MOI information. Thus, when the deadline for release comes up, no judge can make an accurate assessment of whether the individual should be released because the case file is incomplete.

The normal procedure should be for the investigative judge to issue a "straight release" (the individual is to be released immediately) or a "conditional release" (the individual is to be released if he is not otherwise wanted on criminal charges).[184] However, the process of determining whether a person is otherwise wanted can take days, weeks, or even months.[185] The prison officials (MOJ employees) query the police precinct (MOI employees) that made the original arrest whether it has any other outstanding warrants on the same person. If that precinct has other warrants outstanding, it responds directly. If not, a process is initiated to query all police precincts throughout the country.[186] The local police precinct forwards the request up through its regional police headquarters to the provincial police headquarters, which sends it to a MOI central office with a request to query neighboring provinces.[187] An MOI official duly notes the request and sends copies to the other provincial police headquarters, which in turn send the request on down.[188] Responses have to follow the same path up through MOI and back to the originating police precinct, before returning it to the (MOJ) prison officials.[189] This time-intensive process has no real solution in the near term: even if local police precincts had computers and electricity to run them, no centralized database exists where such information might be posted. Although there is, as I was told by an MOI official, a policy that all police units must send a letter to the Police Affairs Division at MOI informing it of all arrests, there is no similar process for the issuance of arrest warrants.[190] Of course, the problem is exacerbated by inter-ministry rivalries: MOI employees have no incentive to maintain a database of arrest warrants issued by investigative judges (MOJ employees).

183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*

Sadly, a data stream already exists that could be used to shorten this timeline significantly. All local precincts mail a report containing copies of all outstanding arrest warrants and their current detainees to MOI twice a month.[191] The officials who receive the reports do not enter the information into any database or ledger. Instead, as I witnessed firsthand, they are permanently "archived" in various boxes stacked in closets or on top of shelving units at the MOI main headquarters.

Notwithstanding the maximum pretrial detention periods mandated in the Code,[192] government officials have no incentive to actually order release from pretrial confinement. Prison funding appears to be based on occupancy rates, so the warden wants to retain as many individuals as possible. Judges do not want to be known as having ordered the release of an individual later found to be guilty or a recidivist. Accordingly, the default is that "temporary" pretrial detention orders are automatically renewed unless affirmatively overridden.[193] Correlative to the foregoing, the granting of bail seems to be a rare phenomenon.

5. Habeas Corpus, Some Thoughts

The dismal track record regarding unjustified pretrial detentions indicates that the constitutional and codal rights discussed above are not self-executing. It also indicates that a *habeas corpus* right of action under Iraqi law does not exist. Because the IJ really "owns" the entire criminal justice process from initial arrest through referral to trial (he oversees all investigations and collection of evidence, he issues the arrest warrants, and he conducts the formal "discovery" process of the investigative hearing), he is theoretically empowered to dismiss charges or take any other action necessary to ensure justice in an individual case. A *habeas corpus* proceeding is designed to compel the agency with control over a detainee to justify to an impartial judge its basis for continued detention of the accused. However, becausethe IJs are both the agency and the judge, a *habeas* proceeding would essentially consist of the judge issuing himself a show cause order. Put that way, the absurdity of the situation is clear.

Is there, then, any remedy in cases where the arrest/detention warrant has lapsed? According to the attorneys who take cases as appointed defense counsel at the Rusafa branch of the Central Criminal Court of Iraq, no remedy exists. They assert that if a complainant has filed a formal charge and a suspect has been formally arrested (pursuant to a warrant issued by an IJ), the judge "has to give" an extension when the warrant expires.

6. Plea Bargaining, Some Thoughts

The concept of plea bargaining seems just as ill-fitting in the Iraqi system as does a *habeas corpus* claim. Because a case still has to be investigated prior to trial,[194] an accused's in-court confession speeds the process along only ever so slightly. However, upon reflection, it would seem that a defendant could spend his

191. *Id.*
192. *Id.*
193. *Id.*
194. *See infra* notes 235-36 and accompanying text.

allotted testimony time introducing mitigating evidence in hopes of leniency in sentencing. In the end, however, it seems that mitigation factors are something the judges would adduce during the course of the investigation and trial. As such, the accused's compliance may not be afforded any weight.

7. Defense Counsel Issues[195]

The health of the Iraqi defense bar has been an issue of concern for some time. Attorneys who support themselves as defense counsel are in an unenviable dilemma. They simply cannot afford to take work only as appointed defense counsel because the fees for each case only amount to the equivalent of twenty to forty U.S. dollars. To make matters worse, the process of paying their vouchers takes at least a year. On the other hand, in the occasional cases where they are retained by a client, they can command fees of one thousand to four thousand U.S. dollars—but then they face animosity from the judges whose salary is significantly less. They also face the very real possibility of retaliation from a complainant's family—or from members of the general community—who assume that those defending suspects accused of terrorism are themselves aligned with terrorist organizations.

The attorneys readily admit that the low fees definitely impact their motivation in appointment cases, but they also admit they can have little impact on a case even when they are motivated. They blame their inability to impact a case on the lack of motivation of salaried investigative judges who have no incentive to invest effort in pursuing a missing case file.

8. Self-Incrimination

The Iraqi Penal Code[196] specifically prohibits the use of torture by officials to extract a confession.[197] In addition, the new Iraq Constitution prohibits psychological and physical torture as well as inhumane treatment; it specifically provides that coerced confessions "shall not be relied on."[198] It also provides that persons made to confess under duress "shall have the right to seek compensation for material and moral damages incurred in accordance with the law."[199] It is up to Iraqi judges to ensure that these provisions are meaningful. It may precisely be the spirit of these provisions that gives rise to anecdotal evidence of judges discrediting confessions that may have been coerced.

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195. See *supra* note 17.

196. Penal Code No. 111 of 1969 (Iraq), *available at* http://law.case.edu/saddamtrial/documents/Iraqi_Penal_Code_1969.pdf; *see also supra* note 135.

197. *Id.* art. 333:

> Any public official or agent who tortures or orders the torture of an accused, witness or informant in order to compel him to confess to the commission of an offense or to make a statement or provide information about such offence or to withhold information or to give a particular opinion in respect of it is punishable by imprisonment or by detention. Torture shall include the use of force or menaces [sic].

198. Article 37, § 1(C), Doustour Joumhourait al-Iraq [The Constitution of the Republic of Iraq] of 2005.

199. *Id.*

By law, an accused is questioned shortly after arrest.[200] Prior to questioning, the accused must be informed of, and understand, the right to remain silent and to have an attorney provided at no expense.[201] An accused's assertion of rights must be scrupulously honored,[202] and the interrogation must otherwise be free of coercion.[203] The IJ or investigator then records the accused's statement[204] (which

200. Criminal Procedure Code No. 23 of 1971 (Iraq), art. 123(A):

> The investigative judge or investigator must question the accused within 24 hours of his attendance, after proving his identity and informing him of the offence of which he is accused. His statements on this should be recorded, with a statement of evidence in his favour. The accused should be questioned again if necessary to establish the truth.

201. *Id.* art. 123(B)-(C):

> B. Before questioning the accused the investigative judge must inform the accused that:
>
> i. he or she has the right to remain silent and no adverse inference may be drawn from accused's decision to exercise that right;
>
> ii. he or she has the right to be represented by an attorney, and if he or she is not able to afford representation, the Court will provide an attorney at no expense to the accused.
>
> C. The investigative judge or investigator must determine whether the accused desires to be represented by an attorney before questioning the accused. If the accused desires an attorney, the investigative judge or investigator shall not question the accused until he or she has retained an attorney or until an attorney has been appointed by the court.

Note that subparagraphs (B) and (C) were added by Criminal Procedures, CPA Memorandum No. 3 of 2003 (Iraq).

202. Criminal Procedure Code, art. 126(B):

> The accused is not required to answer any of the questions he is asked;

see also id. art. 123(C); *supra* note 201.

203. Criminal Procedure Code, art. 127:

> The use of any illegal method to influence the accused and extract an admission is not permitted. Mistreatment, threats, injury, enticement, promises, psychological influence, or use of drugs or intoxicants are considered illegal methods;

see also Article 37, Section 3, Doustour Joumhourait al-Iraq [The Constitution of the Republic of Iraq] of 2005:

> All forms of psychological and physical torture and inhumane treatment are prohibited. Any confession made under force, threat, or torture shall not be relied on, and the victim shall have the right to seek compensation for material and moral damages incurred in accordance with the law.

204. Criminal Procedure Code, art. 128:

> A. Statements of the accused are recorded in the written record by the [investigative] judge or investigator and signed by the accused and the [investigative] judge or investigator. If the accused is unable to sign, this should be recorded on the written record.
>
> B. If the statement of the accused includes an admission to the commission of an offence, the judge must record the statement himself, and read it back after a period of time. The judge and accused must then sign. If the accused would like to write down his statement in his own hand, the judge must enable him to do this, but it must be in the presence of the judge who must sign it, along with the accused, and after recording this in the written report.

is unsworn[205]), including any exculpatory details or evidence adduced by the accused that the judge deems to be admissible.[206]

At any time during the investigative hearing, the accused has the right to make statements, to discuss the statements of other witnesses, and to request that witnesses be summoned.[207]

If an accused's statement implicates a co-defendant, the cases are severed, [208] presumably so that a co-defendant is not convicted based on the unsworn statement of his partner in crime. It appears that Iraqi law makes no provision for testimonial immunity, but it does specifically allow the grant of transactional immunity: an IJ can, with permission of the trial court, immunize an accused in order to receive sworn testimony[209] against a co-conspirator.[210] If the trial court ultimately accepts the witness' testimony as "full and true," his charges are released with prejudice.[211] If the court doubts his testimony, he not only remains on the hook for his previous charges, but his testimony is used against him—although (since the court believes the statement to be a prevarication) the statement at that point is presumably considered only for its value as a mendacity qualifier rather than for the truth of the matter asserted.[212]

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205. *Id.* art. 126(A):
> The accused does not swear the oath unless acting as a witness for other accused persons.

206. *Id.* art. 128(C):
> Testimony which the accused asks to present in his defence should be recorded in the written report along with investigation of other proof presented by him, unless the investigative judge decides not to grant the accused's request, because he believes it be an unjustified attempt to impede the investigation, or to mislead the judge.

207. *Id.* art. 124:
> The accused has the right to make his statement at any time after listening to the statements of any witness, and to discuss it or to request that he is summoned for this purpose.

208. *Id.* art. 125:
> If it becomes clear that the accused is a witness against another accused, his testimony is recorded and the two cases are separated.

209. *Id.* art. 126(A); *see supra* note 205.

210. *Id.* art. 129(A):
> The investigative judge may offer immunity with the agreement of the Felony Court, for reasons recorded in the record, to any person accused of an offence, in order to obtain his testimony against others involved in its commission, on condition that the accused will give a full and true statement. If he accepts the offer, his testimony is heard and he remains an accused person until a decision on the case is issued.

211. *Id.* art. 129(C):
> If the Felony Court finds that the statement given by the accused who has been offered immunity is full and true, then it will halt permanently legal proceedings against him and release him.

212. *Id.* art. 129(B):
> If the accused does not submit a full and true statement, whether through deliberate concealment of any important issue or through false statements, he loses his right to immunity by decree of the criminal court, and procedures are

9. Hearsay

It appears that the court may accept extrajudicial statements made by a witness in another case if the court is convinced that it is impossible to procure the witness to testify in the current case.[213] The same rule seems to apply to extrajudicial confessions.[214]

Despite the right to silence during the investigation phase,[215] the trial "court may ask the defendant any questions considered appropriate to establish the truth before or after issuing a charge against him."[216] Furthermore, "[a] refusal to answer will be considered as evidence against the defendant."[217] Any previous statements given by the defendant will then be read and used against him.[218] In fact, the court has "absolute [discretionary] authority" to accept or reject any statements collected at any time throughout the investigative and hearing process.[219]

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taken against him for the offense for which he was offered immunity or any other related offense. His statements are used as evidence against him.

213. *Id.* art. 217(A):

> The court has absolute authority in evaluating the accused's admission and acting upon it whether it was given in front of the court, in front of the investigative judge, during other court hearing of the same case or in another case, even if the witness subsequently withdraws his statement. The court can accept his confession to the [judicial] investigator if there is enough evidence to convince it that the investigator did not have sufficient time to present the accused to the [investigative] judge so that his confession could be recorded.

214. *Id.* art. 217(B):

> Admissions may not accepted be [sic] if the conditions stipulated in A are not present.

215. *Id.* art. 126(B):

> The accused is not required to answer any of the questions he is asked.

216. *Id.* art. 179:

> The court may ask the accused any questions considered appropriate to establish the truth before or after issuing a charge against him.

217. *Id.* The extensively-annotated version of the Criminal Procedure Code on the *Global Justice Project: Iraq*, *supra* note 1, discusses—in the introductory notes and again in a footnote to CPC Article 179—a botched attempt by the Coalition Provisional Authority (CPA) to delete the second sentence of CPC Article 179, adding that, regardless of the validity of the deletion, the sentence should be correctly rendered in English as: "A refusal to answer will NOT be considered as evidence against the defendant." Criminal Procedure Code, art. 179, n.63. It is impossible to know how well the niceties of this discussion are known to most Iraqi judges.

218. *Id.* art. 180:

> If the accused refuses to answer questions directed to him or if his answers are contradictory or contradict his previous statements, the court may order the reading and hearing of the accused's earlier answers and statements.

219. *Id.* art. 215:

> The court has absolute authority in evaluating the testimony. It can either fully accept it or reject it, accept the statements given by the witness during the police investigation or during reports from the initial [judicial] investigation or given in front of another court in the same case, or completely reject the witness' statements.

10. Evidence

As noted above, no body of black-letter law exists covering limitations on collection and consideration of evidence in Iraqi criminal jurisprudence.[220] About the closest the Code comes to discussing evidence is its tangential reference to chain of custody[221] and a provision stating that the court may consider any statement made by a victim under threat of death.[222]

11. Insanity

If it appears that an accused is mentally incapable of preparing his own defense, a medical committee conducts a mental health examination on him.[223] The court places the case on hold and he is institutionalized.[224] If the court authorizes bail, it may release the accused to his relatives on the condition that they commit to procure appropriate mental health treatment.[225] If the medical committee determines that he was not criminally responsible due to mental illness at the time of the action under review, the court enters a finding of "diminished responsibility" and the accused is released to his family—on the condition that he will undergo appropriate treatment.[226]

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220. *See supra* note 29.

221. Criminal Procedure Code, art. 42:
> Crime scene officers are required to use all possible means to preserve evidence of an offence.

222. *Id.* art. 216:
> The court may accept the statement of a dying victim as evidence relating to the offence and its perpetrator or any other related matter.

223. *Id.* art. 230:
> If it appears during an investigation or proceedings, that the accused is not able to conduct his own defence on the grounds of mental illness, or if the situation requires an examination of his mental faculties in order to test his criminal responsibility, the investigation or court proceedings are suspended, by decision of the investigative judge, or court, and, if he has been charged with an offence for which he cannot be released on bail, he is placed under supervision in a government health institution, capable of treating mental illness. For other offences, however, he is placed in a government, or non-government health institution, at his expense on the request of whoever is acting on his behalf in law, or at the expense of his family, on payment of a surety by a guarantor. A specialist government medical committee is charged with carrying out an examination and presenting a report on the state of his mental health.

224. *Id.*

225. *Id.* art. 231:
> If it appears from the report of the committee referred to in Article 230 that the accused is not able to present his own defence, the investigation is postponed until he has sufficient mental awareness to make his own defence, and he is placed under the supervision of a government health institution if he is accused of an offense for which he cannot be released on bail. But in the case of other offenses, he can be handed over to one his relatives on a surety from a guarantor, on condition that a commitment is made that he should receive treatment in Iraq, or elsewhere.

226. *Id.* art. 232:
> If it appears from the decision of the medical committee that the accused was not criminally responsible owing to mental illness at the time the offence was

F. The Trial

Iraqi penal courts—as opposed to the investigative courts—are divided by subject matter jurisdiction between the Court of Misdemeanor, the Court of Felony, and the Court of Cassation.[227] The Central Criminal Court of Iraq, by the terms of its incorporation, is a hybrid forum with jurisdiction over both felonies and misdemeanors.[228]

As a case wends its way from the investigative court to the trial court, the case and the status of the individual go through a variety of simultaneous transitions. For example, some available translations of the Code, without explanation, change the nomenclature of the individual from accused to defendant.[229] The nature of the case also seems to begin to solidify: whereas an investigation may have covered multiple accused and multiple crimes, the Iraqi penal system favors separate trials of the same accused for separate crimes;[230] joinder of criminal charges only occurs

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committed, the judge will decide diminished responsibility and the court will issue a judgment of diminished responsibility and will take whatever action is necessary for handing him over to one of his relatives, on payment of a guarantee, to undergo whatever treatment is necessary.

227. *Id.* art. 137(A):

> Penal courts are the Court of Misdemeanor, Court of Felony and Court of Cassation. These courts have jurisdiction to consider all criminal cases with a few special exceptions.

The Court of Cassation is an appellate court with "jurisdiction to review provisions and rulings issued on felonies, misdemeanors, and other cases stipulated by law." *Id.* art. 138(C):

> The Court of Cassation has jurisdiction to review provisions and rulings issued on felonies, misdemeanors and other cases stipulated by law.

It also reviews all death sentences. *Id.* art. 254(A):

> If the Criminal Court has issued a sentence of death or life imprisonment, it must send a file on the case to the Court of Cassation within ten days of the issue of the judgment, so that it can be reviewed for cassation, even if an appeal has not been lodged;

see also id. art. 224(D):

> If the court issues a death sentence, it must explain to the person given the sentence that his case papers will be sent automatically to the Court of Cassation for review. He may also appeal against the ruling at the Court of Cassation within 30 days, starting from the day after the ruling has been issued.

228. CPA Order No. 13, § 18 (The CCCI has "nationwide discretionary investigative and trial jurisdiction over any and all criminal violations," but is commissioned to specifically focus on cases involving terrorism, organized crime, government corruption, acts against democratic institutions, hate crimes (violence based on race, nationality, ethnicity, or religion), and cases where individuals would not be able to get a fair trial in a local court.); *see also supra* text accompanying notes 4-9.

229. This is the case with the version posted on the *Grotian Moment Blog*; the *GJPI* version continues to use the term "accused." *See supra* note 1.

230. Criminal Procedure Code, art. 188:

> A. One charge is made for each offence ascribed to a particular individual.
>
> B. One charge is made for multiple offences as stipulated in sub-paragraph 132(A).
>
> C. One charge is made for each connected offence as stipulated in sub-paragraph 132(B).
>
> D. It is permissible to make one charge against all the perpetrators of one offence.

where the offenses are closely related—as a single string of events, as arising from a single common purpose, or as similar offenses against multiple victims.[231] However, several defendants' cases will be consolidated if they involve a single crime.[232] Furthermore, just as an accused can be tried *in absentia*,[233] an absent defendant's case is not severed when there are multiple accused for a single crime.[234]

Still, every defendant has an inviolable (perhaps unwaivable) right to an investigation on all crimes with which he will ultimately be charged[235]—even for

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E. There will be a trial for each charge.

F. The trial will take place as if for a single case under the circumstances stipulated in Articles 132 and 133.

231. *Id.* art. 132(A):

> If several offenses are attributed to the accused, a single case is brought against him in the following circumstances:
>
> i. If the offences resulted from one action;
>
> ii. If the offences resulted from actions linked to each other and for a common purpose;
>
> iii. If the offences are of the same type and are committed by the same defendant against the same victim, even if they occur at different times;
>
> iv. If the offences are of the same type and occurred within one year against different victims, on the condition that there are no more than 3 victims for each case.

232. *Id.* art. 133; a single case is brought as stipulated in Article 132 if there are several accused, whether as principals or accessories.

233. *Id.* art. 135:

> If the accused does not appear before the investigative judge or [judicial] investigator, and is not arrested despite the use of methods of compulsion as stipulated in this law, or if he escapes after arrest or detention, and if there is sufficient evidence for a transfer to court, the investigative judge issues a decision of transfer to the court responsible in order for a trial to be conducted his absence.

Procedures related to appeal of *in absentia* guilty verdicts are set forth in Criminal Procedure Code, arts. 243-48. Notice of the outcome of the case, and issuance of arrest warrants are in Criminal Procedure Code, art. 149:

> A. The trial of an absent accused or one who has absconded is conducted according to the guidelines for the conduct of trials where the accused is present.
>
> B. Notification of the *in absentia* judgement is given to the person against whom the judgement has been made. If the accused has absconded at the time of notification, notification is given as stipulated in Article 143.
>
> C. The court issues an arrest warrant against the person who has been sentenced *in absentia* to a penalty restricting his freedom, for a felony or misdemeanour;

see also id. art. 151:

> In the case of an accused who absconds after presenting his defence but before the issue or [sic] a verdict, without informing the court of any legal excuse, an arrest warrant is issued, requiring him to attend for delivery of the verdict.

234. *Id.* art. 148:

> If there are a number of accused and amongst them is one who has absconded or is absent, the trial of those who are present takes place, as does the trial of those absent, but the case of those who are present takes precedence over the case of those who are absent.

235. On the timing of the official charge, *see infra* Section II.F.1. The Formal Charge.

felonies committed in open court.[236] Thus, if evidence comes to light implicating a suspect who is not before the court, the case *sub judice* may be suspended pending an investigative hearing as to the newly accused, or the single defendant who has already been before an investigative judge may be tried on his or her own accord.[237]

Criminal trials in Iraq, as in other civil law jurisdictions, are meant to be succinct.[238] The business rules for the entire hearing are laid out in one short article of the Code:

> The trial begins with the summoning of the defendant and other parties and the formal identification of the defendant. A decree of transfer is then issued. The court hears the testimony of the complainant and the statements of the civil plaintiff, then sees the evidence and orders the reading of the reports, investigations and other documents. The statements of the defendants are then heard, along with the petitions of the complainants, civil plaintiff, civil prosecutor and public prosecutor.[239]

When a trial court receives a case dossier from an IJ, it sets a trial date and notifies the defendant and all relevant witnesses and parties.[240] If the accused cannot be found, public notice is provided and he may be tried *in absentia*.[241]

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236. Criminal Procedure Code, art. 159:

> A. If a person commits a misdemeanor or infraction whilst in the court room, the court may evaluate the case against him at the time, suspending the initial case and making a ruling after listening to statements from a representative of the Public Prosecutor, if present, and statements in defense of the person mentioned, or transferring him to an investigative judge after making a written record of the incident.
>
> B. If a felony is committed, the court makes a written record of the event and transfers the accused to an investigative judge for the necessary legal steps to be taken.

237. *Id.* art. 155:

> A. It is not permissible to try any accused who has not been referred to the court.
>
> B. If it becomes clear to the court before judgment on a case is made, that there are other persons linked to the offence, either as principals or as accessories, and procedures have not been taken against them, it may consider the case with regard to the accused present, and request that the investigative authorities take legal proceedings against the other persons or decide to suspend the case until the investigation has been completed.

238. I have not heard of any trial lasting longer than an hour. Most take less than half that time.

239. *Id.* art. 167.

240. *Id.* art. 143(A):

> The court, on receipt of the case file, must set a date for the trial and inform the Public Prosecution, the accused and those with any connection and any of the witnesses who are to testify, by means of a written summons, at least one day before the trial in the case of an infraction, three days before for a misdemeanour and 8 days before for a felony. Informing the accused's attorney of the order to attend does not dispense with the need to inform the accused.

241. *Id.* art. 143(C):

> If it becomes clear, once the notification has been issued, that the accused has

As in the investigative hearing, all live witnesses attend the hearing together. They testify under oath,[242] but, as in the investigative hearing, they provide spontaneous statements rather than simply responding to interrogatories. The judges, the prosecutor, the defense counsel, the complainant—even other witnesses—may then ask questions to clarify the witness' testimony.[243] There is no verbatim transcript of court proceedings, so the entire hearing looks more like "Question Time" in Parliament than a deposition[244]—including the fact that the defendant is standing in a dock at the center of the courtroom rather than sitting at a defense table or on a witness stand to the side of the judges' bench.[245]

Any individual with relevant information[246] to provide on the case at hand may come forward or be summoned as a trial witness.[247] Purposely withholding information from the court is grounds for a contempt finding.[248]

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absconded, a summons or arrest warrant is pinned up at his place of residence if known, published in two local newspapers and announced on the radio or television in the case of significant felonies or misdemeanours, in accordance with a decision by the court. An appointment is set for the trial within a period of no less than one month from the last date of publication in the newspaper for a misdemeanour or an infraction and two months for felonies;

see also id. art. 147(A):

The trial will take place when the two parties attend. If the accused has absconded or is absent without legal excuse, despite his having been informed, a trial will take place in his absence.

242. *Id.* art. 168(A):

Before giving testimony each witness is asked to give his full name, profession, age, place of work and relationship to the parties. Before giving his testimony, he must swear that he will speak the truth and nothing but the truth.

243. *Id.* art. 168(B)-(C):

B. The witness gives his testimony orally and he may not be interrupted during its delivery. If he is unable to speak due to disability, the court will give him permission to write his statement. The court may ask any questions necessary in order to clarify the facts after completion of the testimony. The Public Prosecution, complainant, civilian plaintiff, a civil official and the accused may discuss the testimony and ask questions and request clarifications to establish the facts.

C. It is permissible to remove the witness whilst the testimony of another witness is being heard and the witness may be confronted by another witness during the testimony.

244. *See id.* art. 175:

The court may, either on its own or at the request of the parties, request discussion of a testimony or return to its discussion and seek clarification of what the witness has said in order to establish the facts.

245. This is a personal observation of various courtrooms in Baghdad.

246. *Id.* art. 169:

The testimony should be based on the facts which the witness is able to recall through one of his senses;

but see id. art. 214:

The court must decide that the witness is not fit to give testimony if it becomes clear he is unable to remember details of the event or that he is not fully aware of the of value of the testimony he is giving due to his age or his physical or psychological state.

247. *Id.* art. 171:

In the event a witness is unable or unwilling to testify, the court may use previous testimony to bolster, supplement, or constitute witness testimony.[249] The court may dispatch a judge or other representative of the court to take the testimony of a witness unable to attend the trial, in which case the parties or their representatives may attend and participate in the taking of the testimony.[250]

> The court may hear the testimony of anyone who attends the trial and anyone who puts himself forward with information. It may summon any person to attend to deliver his testimony if it is considered that this testimony will help establish the truth;

see also id. art. 174:

> A. If the witness does not attend, the court may, despite his prior notification, permit that he be re-summoned to attend or it may issue an arrest warrant against him for attendance to deliver the testimony and the witness may be given a penalty as prescribed by law for not attending.
>
> B. If the witness attends the court before the trial has been completed and it becomes clear that he has an acceptable excuse for being late, the court may retract the judgement issued against him.

248. *Id.* art. 176:

> If the witness refuses to swear the oath or give testimony, other than in cases where this is permissible by law, the court may issue a sentence against him as prescribed by law for refusal to testify and may order the reading of his previous statement which should then be treated as a testimony which was given in front of the court.

249. *Id.* art. 170:

> The court may order that testimony, previously given in the written report collating the evidence or during the initial investigation or before it or any another criminal court, be heard in front of it, if the witness claims not to recall all or some of the facts to which he testified, or if the previous statement clarifies his current statement before the court. The court and other parties may discuss all of this;

see also id. art. 172:

> If the witness does not appear or if his testimony cannot be heard because he has died, is unable to speak or is no longer qualified to testify or because his whereabouts are unknown or if his appearance before the court would cause delay or exorbitant expense, the court may decide to hear testimony previously given in the written record of the collection of evidence or during the initial investigation, or in front of another criminal court in the same case. This testimony will be treated as though it were given before the court.

250. *Id.* art. 173:

> If the witness is excused due to illness, or any other reason for his inability to attend, from giving his testimony, the court, after informing the parties, may delegate a member of the court, an investigative judge or misdemeanour judge, to travel to the witness's location to hear the witness and send a written report to the court.
>
> The parties may attend in person or through representatives and direct the questions they think appropriate. If, after the transfer or sending of a judge to the location of the witness, the reason is deemed not to be valid, a penalty may be imposed as prescribed by law for failure to attend.

Unlike the more intimate—and closed—nature of the investigative hearing conducted by an IJ, the trial is an open proceeding.[251] However, as with the investigative hearing, the trial judges own their courtroom. Thus, they may:

- remove the defendant from the proceedings for being unruly,[252]
- (except in capital cases) order the defendant released or held during the proceedings,[253]
- hold audience members in contempt for leaving an open session of court,[254]
- cut off irrelevant argument or testimony,[255]
- exclude witnesses from court while not testifying,[256] and
- suspend proceedings, as they deem necessary.[257]

Likewise, the trial judges also have considerable leeway in limiting their consideration of testimony and argument.[258] As to information not available

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251. *Id.* art. 152:
> Trial sessions must be open unless the court decides that all or part should be held in private and not attended by anyone not connected with the cases, for reasons of security or maintaining decency. It may forbid the attendance of certain groups of people.

252. *Id.* art. 158:
> The accused may not be removed from the court room during consideration of the case unless he violates the rules of the court, in which case procedures continue as if he were present. The court must keep him informed of the procedures which took place in his absence.

253. *Id.* art. 157:
> The court may, at any time whilst the case is being considered, order the release of the accused with or without bail unless he is accused of an offence punishable by death. It may order his arrest or detention following any release, stating the reasons for this in the order issued.

254. *Id.* art. 153:
> The court and those entrusted with its administration may prohibit any individual from leaving the court room, and if someone leaves in violation of this prohibition, without the permission of the court, the court may rule immediately for detention for 24 hours or a fine not exceeding 3 dinars, with no right to appeal against this ruling. The court may however issue a pardon before the end of the session and retract the ruling issued.

255. *Id.* art. 154:
> The court may prevent the parties and their representatives speaking at undue length or speaking outside the subject of the case, repeating statements, violating guidelines or making accusations against another party or a person outside the case who is unable to put forward a defence.

256. *Id.* art. 168(C):
> It is permissible to remove the witness whilst the testimony of another witness is being heard . . . .

257. *Id.* art. 162:
> The court may decide on the suspension of a case for a suitable period if necessitated by circumstances. It must inform the accused, other litigants and witnesses who have not yet testified that they are to attend the session when it resumes and the court will meet the cost of their expenses.

before the court, the trial court has subpoena power[259] and can order additional investigation,[260] including the appointment of experts.[261] Subpoenaed items must be presented to all parties present at the trial.[262] If a judge is replaced during the course of the trial, the new judge need not start a *de novo* review of the case: it is within his discretion to base his judgment on the procedures and investigations undertaken by his predecessor.[263]

Notwithstanding all of the foregoing powers of the trial court, the Code nevertheless accords a minimum level of dignity to the defendant, even as it offers a nod to the adage that one is considered innocent until proved guilty:[264] the defendant is not subject to physical restraints while in the courtroom.[265]

1. The Formal Charge

Perhaps the most vivid difference between common law and civil law criminal trials is in the timing of the charge. Although the accused is certainly aware of the type of offense the IJ is investigating, he may not know specifically with which crime the IJ will charge him. In Iraqi courts, it is not until after the trial judge has taken and considered all evidence, that the trial judge officially

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258. *Compare* Criminal Procedure Code, art. 154, *supra* note 255 (trial court may limit testimony or argument for undue length, offering irrelevant information, repeating statements, violating guidelines, or making accusations about persons not before the court) *and* Criminal Procedure Code, art. 64, *supra* note 97 (investigative judge may only restrict testimony that is irrelevant, offensive, or harmful to security).

259. Criminal Procedure Code, art. 163:

> The court may order that any investigatory procedure or procedures be taken, or that any person be ordered to hand over information, documents, or items, if that will assist the investigation. In the event of a refusal to hand over something in his possession, a person should be transferred to an investigative judge for legal procedures to be taken against him.

260. *Id.; see also id.* art. 165:

> The court may proceed to conduct an investigation if it appears that this will assist in establishing the truth and should allow the litigants to attend the investigation.

261. *Id.* art. 166:

> The court may appoint one or more experts in matters requiring their opinion and may permit the wages of the expert to be borne by the treasury as long as the price is not unreasonably high.

262. *Id.* art. 164:

> The court orders that items seized be brought to the courtroom wherever possible, where the accused and other parties are able to see and note them.

263. *Id.* art. 161:

> If the case is being reviewed by a judge whose place is taken by another judge, the second judge may base his judgement on procedures and investigations undertaken by his predecessor or he may repeat these procedures and investigations himself.

264. In fact, the current Constitution, adopted long after the Code, specifically provides: "The accused is innocent until proven guilty in a fair legal trial." Article 19, Section 5, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005.

265. Criminal Procedure Code, art. 156:

> The accused attends the court room without restraint or handcuffs and the court must use necessary means to ensure the security of the court room.

determines what crime, if any, the defendant actually committed.[266] This practice obviates the need for litigation of issues, such as specificity of charges, lesser included offenses, multipliciousness of charges, and the like. After the facts are firmly established in the minds of the judges, they can turn their legal training to finding the proper niche for the given facts in the substantive criminal law.

The charge is formalized once all the evidence has been received at trial; its parameters are not circumscribed by the offense as characterized in the original arrest warrant or the findings of the investigative judge.[267] If the complainant has, during the course of the judicial proceedings, withdrawn the complaint, or if the facts do not validate a finding of guilt on any possible charge, the judges dismiss the case.[268] (Such an outcome is fairly unlikely, since the IJ would presumably have weeded out any such cases.) If, however, the judges determine among themselves that the facts evidence a crime, the defendant is "charged as appropriate" and asked to enter a plea.[269]

If there is anything short of a full and valid confession—the defendant pleads not guilty, appears confused by the proceedings, does not offer a defense, etc.—"the case goes to trial." The defendant is afforded an opportunity to present any valid witnesses and evidence he might have.[270] Following the defense case, the

266. *Id.* art. 203.

267. *Id.* art. 187:

> A. The charge is written down on a special piece of paper in the name of the judge issuing it, with his position and includes the name of the accused, his identity details, the place and time of commission of the offence and a legal description of the offence and the name of the victim or of the item against which the offence was committed, the way in which it was committed and the legal paragraphs which apply. The paper is dated and signed by the judge or head of the court.
>
> B. In setting out the description for the offence, the court is not restricted to the definition in the arrest warrant or summons or transfer decision.

268. *Id.* art. 181:

> A. If the complainant withdraws the complaint or the court considers that the complaint has been withdrawn in accordance with the provisions of Article 150 [regarding abandonment or withdrawal of claims] and if the offence is one in which conciliation is permissible without a court agreement, the complaint is considered as rejected.
>
> B. If, after taking steps to clarify the situation as described in the Articles above, it becomes clear to the court that the evidence does not point to the accused having committed the offence with which he is charged, his release is ordered.

269. *Id.* art. 181(C):

> If it appears to the court, after the aforementioned steps have been taken, that the evidence indicates that the accused has committed the offence being considered, then he is charged as appropriate, the charge is read to him and clarified, and he is asked to enter a plea.

270. *Id.* art. 181(D):

> If he denies the charge or does not offer a defence, if he requests a trial or if the court considers that his confession is confused, or that he does not understand the consequences or if the offence is punishable by death then the case goes to trial, defence witnesses are heard and the remaining evidence in his defence is heard, unless the court finds it to be an unjustified attempt to impede the investigation or

parties, the prosecutor, and the defense counsel may each make a closing statement;[271] however, the defendant gets the last word.[272]

If the defendant confesses to the charge, the court hears him out and the case is finished—there is no need for further evidence.[273] Several provisions in the Code are in place to ensure that the confession is valid: the court cannot consider any part of a confession it deems to be the product of coercion,[274] and the court can parse a non-coerced confession and accept—at face value only—those parts it deems truthful and corroborated,[275] even if the confession was extra-judicial.[276] It also follows that the court would have to find the defendant competent the same as any other witness.[277] Ultimately, however, harkening back to the concept that the judges are masters of their domain, the judges can accept any confession they, in their discretion, deem valid.[278]

In the end, while *ex parte* communications and a judge's personal extra-judicial knowledge may not have any bearing on a verdict,[279] the judges are free to

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to mislead the court . . . .

271. *Id.* art. 181(D):
When this has been completed, the commentary of the other parties, the Public Prosecution, and the defence of the accused are heard . . . .

272. *Id.* art. 181(E):
The defendant should be the last to speak in the judicial investigation or trial.

273. *Id.* art. 181(D):
If the defendant confesses to the charge against him and the court is satisfied of the truth of his confession and that he understands its implications, then the court listens to his defence and issues a judgement in the case without any requirement for further evidence . . . .

274. *Id.* art. 218:
It is stipulated that an admission must not have been extracted by coercion.

275. *Id.* art. 219:
It is permissible for the court to divide the admission up, accept the part which it believes to be correct and reject the rest. It is not however permissible to interpret the admission or divide it into parts if it is the only piece of evidence in the case.

276. *Id.* art. 217:
A. The court has absolute authority in evaluating the accused's admission and acting upon it whether it was given in front of the court, in front of the investigative judge, during other court hearing of the same case or in another case, even if the witness subsequently withdraws his statement. The court can accept his admission to the [judicial] investigator if there is enough evidence to convince it that the investigator did not have sufficient time to present the accused to the [investigative] judge so that his admission could be recorded.
B. Admissions may not accepted be [sic] if the conditions stipulated in A are not present.

277. *Id.* art. 214
The court must decide that the witness is not fit to give testimony if it becomes clear he is unable to remember details of the event or that he is not fully aware of the of [sic] value of the testimony he is giving due to his age or his physical or psychological state.

278. *Id.* art. 213(C):
The court can accept an admission only if it is satisfied with it.

279. *Id.* art. 212:

consider a wide range of information—with the caveat that a conviction cannot be based on one uncorroborated witness[280] (unless the witness is the defendant[281]). They may consider as substantive evidence all statements made during the trial hearing, hearsay statements made by a victim under threat of death,[282] anything in the investigation dossier forwarded by the investigative judge, and any other reports of investigation prepared by other investigating officials (as long as the official wrote them concurrent with the events "or not long afterward").[283]

2. The Ruling

After the court gives the defendant the opportunity to make his final statement, the case is submitted to the court for a verdict. The court declares a formal recess and "retires." During this recess, the defendant, defense counsel, witnesses, and gallery are ushered from the room, while the judges and prosecutor remain inside. The judges vote and formulate their ruling and, if necessary, the penalty.[284] They prepare a formal record of the trial on the spot—there is no verbatim transcript in civil law systems—with a summary of the procedural

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> The court is not permitted, in its ruling, to rely upon a piece of evidence which has not been brought up for discussion or referred to during the hearing, nor is it permitted to rely on a piece of paper given to it by a litigant without the rest of the litigants seeing it. The judge cannot give a ruling on the basis of his personal knowledge.

280. *Id.* art. 213:

> A. The court's verdict in a case is based on the extent to which it is satisfied by the evidence presented during any stage of the inquiry or the hearing. Evidence includes admissions reports, witness statements, written records of an interrogation, other official discoveries, reports of experts and technicians, background information and other legally established evidence.
>
> B. One testimony is not sufficient for a ruling if it is not corroborated by background information other convincing evidence or a confession from the accused. The exception to this rule is if the law specifies a particular way of proving a case, which must be followed.

281. *See id.* art. 219; *see also supra* note 275.

282. Criminal Procedure Code, art. 216:

> The court may accept the statement of any dying victim as evidence relating to the offence and its perpetrator or any other related matter.

283. *Id.* art. 220:

> A. Reports of investigations and of the collating of evidence, and all the details in them about procedures of disclosure, searching, and other official reports, are regarded as elements of proof to be taken into consideration by the court. The litigation can discuss them or prove the opposite.
>
> B. The court must treat events written down by the officials in their reports as part of their official duties as evidence which corroborates their statement, provided they wrote them when they occurred or not long afterwards;

see also id. art. 213; *supra* note 280.

284. Criminal Procedure Code, art. 223:

> A. The court retires before giving its ruling. After it has formulated the ruling, the hearing is resumed publicly. The ruling is read out to the accused or its contents are made clear to him.
>
> B. If the verdict is guilty, then the court must issue another ruling at the same hearing with the penalty and explain them both.

aspects of the case, from investigation through trial.[285] The ruling, which details the substantive aspects of the case, lays out the foundational basis of the verdict, the legal ruling, and any dissenting opinions.[286] Interestingly, dissenters from a guilty verdict must still opine on an appropriate sentence.[287]

If the evidence indicates a more serious offense than was charged, or if there is variance between the charge and the accusation, the charge is withdrawn and a new charge issued in its place.[288] The court notifies the defendant of the change and allows him time to defend against the new charge.[289] On the other hand, if the court determines that the defendant has been overcharged, it simply adjusts its verdict accordingly.[290]

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285. *Id.* art. 222:

> Everything that takes place in the court is written up in a report. The judge or the chief justice signs all its pages. The report must include the date of each hearing, whether it was public or closed, the names of the judge or judges who considered the case, the clerk, the representative of the Public Prosecution, the names of the accused, and other members of accused's team, the names of the witnesses, a report on the papers which were read out, the requests made, the procedures concluded, a summary of rulings, and everything else that occurred during the trial.

286. *Id.* art. 224:

> A. The ruling should contain the name of the judge or judges who have issued it, the accused, the other parties and a representative of the Public Prosecution, a description of the offence he is accused of perpetrating, the paragraph of law which applies, the reasons for the court's ruling and the reasons for the level of sentence passed. The ruling on the penalty must contain the principal and subsidiary penalty penalties impose [sic] by the court; the amount of compensation for which the court has ruled the accused or person, if any, taking civil liability to be liable; or the court's decision on the return, confiscation or destruction of assets or items claimed. The judge or the court's panel signs and dates every ruling and seals them with the seal of the court.
>
> B. Rulings are issued on the basis of consensus or a majority of them. All those dissenting from the majority decision must explain their views in writing.

287. *Id.* art. 224(C):

> Any person disagreeing with the guilty ruling must still express his opinion on the most appropriate penalty for the offence on which a guilty ruling has been made.

288. *Id.* art. 190(A):

> If it becomes clear that the accused is accused of an offense punishable by a more severe penalty than that with which he has been charged, or if there is a difference between the descriptions given in the charge and the accusation, the charge must be withdrawn and a new charge issued.

289. *Id.* art. 190(B):

> The court notifies the accused of all changes and amendments made to the charge in accordance with sub-paragraph A and grants a period of time for defence to challenge this new charge if this is requested.

290. *Id.* art. 191:

> If the accused is charged with an offence consisting of a number of actions, and it subsequently appears that the accused committed only part of the offence, the court completes the trial and issues a verdict without the need for a new charge to be issued.

Once the paperwork is completed (normally a period lasting no more than five to ten minutes), the hearing is reconvened; the defendant is notified of the verdict and (if applicable) the penalty.[291] Upon conviction of a capital offense, the court also notifies the defendant of the automatic appeal process.[292]

The "burden of proof"—to put it in common-law parlance—seems fairly vague by American standards: if "the court is satisfied that the defendant committed the offense of which he is accused, it issues a verdict of guilty and rules on the penalty to be applied."[293] "If the court is satisfied that the defendant did not commit the offense of which he is accused or that the action in question is not a criminal offense, a verdict of not guilty is issued."[294] On similarly-vague standards, the court may also dismiss the charge for lack of evidence,[295] or find the defendant incompetent.[296] In the latter three situations, the defendant is released (unless other cases remain pending).[297]

Although cassation and retrial appeals are available to one convicted in an Iraqi criminal trial, Iraqi law provides for definitive finality, both as to procedure[298]

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291. *Id.* art. 181(D):

> [Following closing statements of all parties and the defendant, t]he end of the trial is then announced, and the court issues its verdict in the same session or in another session held soon afterward;

see also id. art. 223; *supra* note 284.

292. Criminal Procedure Code, art. 224(D):

> If the court issues a death sentence, it must explain to the person given the sentence that his case papers will be sent automatically to the Court of Cassation for review. He may also appeal against the ruling at the Court of Cassation within 30 days, starting from the day after the ruling has been issued.

293. *Id.* art. 182(A):

> If, after the trial has been conducted as above, the court is satisfied that the accused committed the offence of which he is accused, it issues a verdict of guilty and rules on the penalty to be applied.

294. *Id.* art. 182(B):

> If the court is satisfied that the defendant did not commit the offence of which he is accused or that the action in question is not a criminal offence, a verdict of not guilty is issued.

295. *Id.* art. 182(C):

> If it becomes clear to the court that there is insufficient evidence to condemn him the charge is dropped and he is released.

296. *Id.* art. 182(D):

> If it becomes clear to the court that the accused is not legally responsible for his actions the court issues a judgment of diminished responsibility and follows the steps stipulated by law.

297. *Id.* art. 182(E):

> A detainee is released when a verdict of not-guilty, diminished responsibility, release or rejection of the complaint is issued, as long as there is no other legal reason for his detention.

298. *Id.* art. 225:

> The court is not permitted to retract, alter or change a ruling it has issued except to correct a material error. This must be noted down in the margin and considered a part of the ruling.

and as to substance.[299] Thus, once the court issues a ruling, only clerical changes may be made and the civil trial can use the finding as conclusive proof of guilt.

G. The Trial, Some Observations

It comes as a shock to most U.S. attorneys that a criminal trial in Iraq lasts on the order of thirty minutes, and that deliberations take less than five. However, given a good understanding of the entirety of the process leading up to the trial, this should really come as no surprise. In my experience, it was rare that the trial judges would call live witnesses.[300] Why should they? Their statements had been duly recorded by a trained investigative judge. Thus, the vast majority of the hearing is comprised of administrative duties: formally reviewing the witness statements, questioning the defendant on any previous statements he had made, and propounding the final charge.[301] As the judges and prosecutor have already reviewed the case file beforehand, the hearing is really meant to clarify any confusion arising from the record. And the deliberations? Because the judges are familiar with both the law and the established facts, it would be surprising if it took them any longer to agree on a verdict.

I pause here to note one interesting point about Iraqi justice. The United States Constitution provides criminal defendants with a right to be confronted by their accusers.[302] There is no such provision in Iraqi law. In fact, to the contrary, there is a recognized procedure for informants to be granted anonymity in the most serious cases.[303] They provide an *in camera* statement to the IJ and their identities are never disclosed to the accused/defendant nor to the public.[304] Although this would be heresy (and hearsay) in a U.S. courtroom, the IJ and trial judges have a fiduciary duty to remain impartial. They accord the testimony only as much weight as they deem appropriate under the law, considering it in conjunction with all other evidence in the case. Still, I cannot help but be cynical myself. I observed a trial where, as far as I could understand through the translation, the defendant—a frumpy man in his sixties—was ultimately convicted of terrorist acts and condemned to hang based on the accusations of one or two anonymous

299. *Id.* art. 227(A):

> A final criminal verdict of guilty or not guilty is proof of the event to which the offense relates, ascribing it to its perpetrator and its legal status.

300. Most of the witness statements are collected by the investigative judge. *See supra* text accompanying notes 78-79.

301. Criminal Procedure Code, art. 203; *see supra* note 266.

302. U.S. CONST. amend. VI.

303. Criminal Procedure Code, art. 47(B):

> If the complaint is about offences against the internal or external security of the state, crimes of economic sabotage and other crimes punishable by death, life imprisonment or temporary imprisonment and the informant asks to remain anonymous, and not to be a witness, the judge has to register this with the notification in a special record prepared for this purpose, and conduct the investigation according to the rules, considering the information included in the notification without mentioning the informant's identity in the investigative paper.

304. Id.

witnesses. Knowing he would never learn the identity of the complainant, he begged the court to consider that it might be, as he supposed, the vindictive accusation of his estranged wife. In the end, either the informant was not his wife or the judges believed her testimony over his plaintive protests.

III. POST-TRIAL ISSUES

A. Cassation

The Court of Cassation is an appellate court with "jurisdiction to review provisions and rulings issued on felonies, misdemeanors, and other cases stipulated by law."[305] It conducts mandatory review of all capital and life imprisonment cases.[306] Additionally, any party—the prosecutor, the accused, the complainant, the civil plaintiff—can appeal the substantive ruling or judgment in a finalized case.[307] The Cassation Court can also review a case *sua sponte*.[308] Mistakes in the application or interpretation of the law, as well as material procedural errors, can

305. *Id.* art. 138(C); *see supra* note 227.

306. Criminal Procedure Code, art. 254(A):

> If the Felony Court has issued a sentence of death or life imprisonment in the presence of the accused, it must send a file on the case to the appellate court within ten days of the issue of the judgment, so that it can be reviewed for cassation, even if an appeal has not been lodged.

307. *Id.* art. 249(A):

> The Public Prosecutor, the accused, the complainant, the civil plaintiff and the person who is liable under civil law have the right to appeal to the Court of Cassation against the provisions, decisions and judgments issued by the Court of Felonies on a misdemeanor or felony, if it was based on a breach of the law or a mistake in the application of the law or in its interpretation, or if there was a fundamental error in the standard procedures or in the assessment of the evidence or of the penalty, and this error influenced the judgment.

The civil plaintiff and the person with civil liability can appeal the correlative civil rulings on the non-criminal side of the case. *See id.* art. 251(A).

308. *Id.* art. 264(A):

> In addition to the provisions put forward, the Court of Cassation may, either of its own accord or in response to a request from the Public Prosecution or anyone else connected with the case, ask for the file on any criminal case to check the provisions and rulings issued on it, as well as the procedures and orders. In this case, it has the authority stipulated in this decision to consider an appeal, although it may not reverse a finding of not guilty or increase the severity of the penalty, unless it is requested so to do within 30 days from the date of issue of the judgment or ruling.

be appealed,[309] but jurisdictional or detention determinations cannot.[310] An appeal petition for any ruling incorporates all prior related judgments or decisions.[311]

An appellant must submit the petition for appeal through official channels within thirty days following the date of judgment.[312] The court issuing the decision being appealed is responsible for forwarding the case file to the Court of Cassation.[313] The court must also automatically forward files on cases resulting in sentences of death or life imprisonment within ten days.[314]

When the Court of Cassation receives an appeal, it solicits review and input from the Public Prosecutor,[315] and considers any arguments made by the parties.[316]

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309. *Id.* art. 249(B):
> A mistake in the proceedings cannot be ignored unless it has not been damaging to the defense of the accused.

310. *Id.* art. 249(C):
> No individual appeal for cassation will be accepted over decisions issued on matters of jurisdiction, over preparatory and administrative decisions or any other decision on which there has not been a ruling in the case, unless it is subject to a halt in progress in the case; decisions involving arrest, detention and release on bail, or release without bail are also excluded.

311. *Id.* art. 250:
> An appeal against a judgment or decision on which there has been a ruling in the case must include all the judgments and decisions already issued or connected with it.

312. *Id.* art. 252:
> A. The appeal takes place by means of a petition presented by the petitioner, or his legal representative, to the criminal court which issued the judgment, to any other criminal court, or directly to the Court of Cassation, within a period of thirty days, starting from the day after the judgment was issued, if in the presence of the parties, or from the date it was regarded as having the status of being issued in the presence of the parties, if it was in absentia.
> B. If the petitioner is in prison, in detention, or in any way inhibited, he may present the petition through a prison, detention centre or appropriate official.
> C. The petition contains the name of the petitioner, a summary of the judgment against him and its date, the name of the court which issued the judgment, the grounds on which the appeal is based and the final result.
> D. The petitioner may show the grounds for the appeal separately on the petition, or he may give new grounds, before the decision is made. It is the responsibility of all parties involved in the case to present their own written statements and applications.

313. *Id.* art. 253:
> It is up to the court that issued the judgment or decision for cassation to send a file on the case to the Court of Cassation, as soon as an appeal petition has been presented to it, or as soon as the Court of Cassation calls for it, in pursuance of Article 249, Sub-paragraph C.

314. *Id.* art. 254(A); *see supra* note 306.

315. Criminal Procedure Code, art. 255:
> In accordance with Article 254, the Court of Cassation sends the case file to the Chief Prosecutor's Office, immediately upon its receipt together with the grounds for the appeal, petitions and statements received from the parties involved in the case, presenting their demands and queries about the judgment or decision within 20 days of their receipt.

316. *Id.* art. 254(C):

The Court can summon the parties (the accused, the plaintiff, the civil plaintiff, and the Public Prosecutor) as it deems necessary.[317]

The Court has plenary authority to correct jurisdictional problems in a case[318] and to change the substantive outcome, including reformation of the penalty and redefinition of the offense to conform to the facts adduced by the investigative and trial judges.[319] It may confirm a verdict of guilty *vel non*, confirm or reduce an adjudged penalty, order a new trial—and even reverse a finding of not guilty or return a case for consideration of a higher sentence.[320] Regardless of the action it takes, the court must identify the grounds for its decision.[321]

The appellate court shall accept papers submitted by the accused and those involved in the case before it issues its decision.

317. *Id.* art. 258:

A. If it appears to the Court of Cassation that an appeal against a judgment or decision issued by the criminal court has not been presented within the period specified in law, it will confirm its formal rejection.

B. It is up to the Court of Cassation to summon the accused, the plaintiff, the civil plaintiff or person with civil liability (or both), or the representative of the Public Prosecution to hear their statements or for any purpose it requires in order to obtain the truth.

318. *Id.* art. 261:

If the Court of Cassation reverses the verdict issued by a court which does not have jurisdiction, the case is transferred to the court which does have jurisdiction and the court which issued the verdict is given notification.

319. *Id.* art. 260:

The Court of Cassation may change the legal description of the offence for which a verdict of guilty has been issued against the accused to another description which corresponds with the nature of the act committed and may pronounce him guilty in accordance with the paragraph of the law which applies to this action, and review the penalty to see if it is appropriate or to make is more lenient.

320. *Id.* art. 259(A):

It is up to the Court of Cassation, after checking the case documentation, to issue its decision on the matter in one of the following ways:

1. Confirm the ruling on the evidence presented and the principal and any supplementary penalties passed, as well as any other legal clauses;

2. Confirm the ruling of not guilty, conciliation, diminished responsibility or the decision to discharge, or any other ruling or decision in the case;

3. Confirm the conviction with a reduced penalty;

4. Confirm the conviction and return the documents, for review of the penalty, with a view to increasing its severity;

5. Return the documents to the Court once again to review the verdict of not guilty, with a view to passing a sentence;

6. Reverse the guilty verdict and the principal and supplementary penalties, and any other legal judgments, with a view to passing a verdict of not guilty, annulling the charge and releasing the accused.

7. Reverse the conviction ruling and penalty ruling and return the documentation to the Court for a re-trial, either complete or partial;

8. Reverse the ruling of not guilty, conciliation or diminished responsibility, or the decision to discharge, or any other ruling or decision in the case, return the documentation for a re-trial or a repeat judicial investigation.

9. Confirm the ruling issued in a civil case, reverse it completely, or reduce the amount of the penalty awarded, or return the ruling to the court to

During the pendency of an appeal, the defendant is still subject to implementation of the adjudged sentence (other than death).[322]

In addition to appeals of final verdicts, the prosecutor may submit an interlocutory appeal, requesting that the Court terminate a case, temporarily or permanently, if he or she deems that justice so requires.[323] If the Court orders a permanent suspension of proceedings pursuant to such an appeal, this ruling is equivalent to a not-guilty verdict (but it does not affect any civil actions arising out of the same incident).[324]

Parties to the case may request a correction of the Cassation decision on substantive grounds,[325] but no recognizable right of action exists for correction of

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complete the investigation, or to hold a review with the aim of increasing the amount of the penalty awarded.

321. *Id.* art. 259(B):
The Court of Cassation will explain in its decision the grounds on which it is based.

322. *Id.* art. 256:
An application for cassation over judgments and decisions does not imply suspension of their implementation unless the law so stipulates.

323. *Id.* art. 199:
A. The Chief Prosecutor may request that the Court of Cassation put an end to the procedures of examination or trial, either temporarily or permanently, in any case up to the point of the issue of the final verdict, if there is a reason justifying this action.
B. The request must include the justification and, when submitted to the Court of Cassation, the papers of the court are requested, and the investigative judge or court must send them for examination on the case.
C. The Court of Cassation checks the request and decides whether to accept it and suspend proceedings permanently or temporarily for a period not exceeding three years, if he finds justification. If there is no justification, the request will be refused.
D. After the Court of Cassation has issued its decision, the file is returned and a copy of the decision is sent to the Director of Public Prosecutions.
E. If the decision stipulates a suspension of proceedings, the investigative judge or court must release the accused if he is detained. The issue of this decision will not prejudice the right of the judicial authorities or court to confiscate items, the possession of which is illegal.
F. The decision to suspend proceedings temporarily may be converted to one of permanent suspension in accordance with the provisions stipulated in this section.

324. *Id.* art. 200:
A. The investigation and trial will resume after the end of a period of temporary suspension from the point where they stopped.
B. The decision to suspend proceedings permanently has the same legal effect as a not guilty verdict, although it does not prejudice potential damages from a civil case raised, or the payment of compensation.

325. *Id.* art. 266:
A. The Public Prosecution, the convicted person and all others connected with a criminal case may request the correction of a legal error in the decision issued by the Court of Cassation, provided the request is submitted within 30 days, counted from the date a convicted, imprisoned or detained person is notified of the cassation decision or, otherwise, from the date the court dealing with the case receives the case documentation from the Court of Cassation.

decisions ordering additional procedures.[326] Only one request may be accepted (per party?).[327] The Court's decision to accept or reject a request for correction is final—it cannot be corrected.[328]

B. Retrial

Retrial may be requested through the Public Prosecutor[329] in the following circumstances: the defendant's putative murder victim has been found alive; another person has subsequently been convicted of the same crime; the defendant's conviction was based on an expert's testimony or document's authenticity which is later proven to be false; previously-unknown exculpatory facts have come to light; the conviction was based on another judgment subsequently quashed or annulled; or the offense or sentence no longer applies to the accused.[330] If a request for retrial is denied, it may not be resubmitted without citing additional grounds.[331]

B. The request is submitted directly to the Court of Cassation, or through the court, or prison or centre administration, if the convicted person is already in prison or detained.

326. *Id.* art. 267:

A request for correction is not accepted for the following decisions:

A. A decision for reversal and re-trial or a second judicial investigation;

B. A decision issued for the return of case documentation for review of the judgment;

C. A decision or judgment issued by the Court of Cassation General Board.

327. *Id.* art. 269(A):

A request for correction can only be accepted on one occasion.

328. *Id.* art. 269(B):

Decisions to turn down or accept a request for correction cannot be corrected after issue.

329. *Id.* art. 271:

A request for a re-trial is submitted to the Public Prosecution by the person convicted, or whoever represents him in law. If the person convicted has died the request can be submitted by his wife or one of his relatives, but the request must clearly explain the ground on which it is based and be accompanied by supporting documentation.

330. *Id.* art. 270:

A re-trial can be requested for a case which resulted in a sentence or imposition of penalties for a felony or misdemeanor under the following circumstances:

A. If the accused was convicted of murder and the person for whose murder he was convicted is found alive;

B. If a person was convicted of an offense and a judgment was later issued against another person for committing the same offence since one of the two judgments must be against a person innocent of the offense;

C. If a person is convicted on the basis of the testimony of an expert or the opinion of a specialist, or document, and later a definitive judgment is issued against the witness or expert on the basis of having borne false witness, or the document is proven to be a forgery;

D. If after the judgment is issued, facts come to light, or documents are presented which were not known at the time of the trial, and these prove the innocence of the convicted person.

E. If the judgment was based on a judgment which was quashed or annulled by lawful means.

F. If a guilty or not guilty judgment, or a final decision for discharge was

After the petition is submitted, the Public Prosecutor reviews the case file and submits an opinion on the merits of the petition to the Court of Cassation.[332] The Court of Cassation then reviews the case file and the evidence supporting the request[333] to determine whether the legal preconditions for retrial are satisfied.[334] The retrying court conducts a new trial, which can result in partial or full annulment of the previous judgment, a confirmation of the previous findings and sentence, or affirmation of the conviction with a new sentence.[335] As with an application for cassation,[336] the defendant is subject to the sentence originally adjudged during the petition review and any retrial process: the grant of a retrial petition does not estop the enforcement of any penalty except death.[337] Any new sentence adjudged cannot exceed the original sentence[338]—except, presumably in cases where new evidence of additional crimes has also come to light.

An annulment results in the return of the defendant to his *status quo ante* in all respects.[339] Thus, a retrial proceeding continues despite the death of the

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issued on the basis of a criminal act, either separate or related to the original offence;

G. If for any lawful reason the offence or sentence no longer apply to the accused.

331. *Id.* art. 279:

If the request for a re-trial is turned down, or if a decision is issued for non-interference with the original judgment, the request cannot be submitted for a second time, on exactly the same grounds as were used in the first request.

332. *Id.* art. 272:

The Public Prosecution will carry out an examination of the grounds supporting the request and will check the case documentation. He then submits the papers, together with his assessment, to the Court of Cassation as quickly as possible.

333. *Id.* art. 274:

The Court of Cassation reviews the request by carrying out an inspection of the case documentation and it is up to the court to undertake whatever inquiries and questioning of witnesses it considers necessary.

334. *Id.* art. 275:

If the Court of Cassation finds that the request for a re-trial fails to satisfy the necessary legal conditions, it will decide to turn it down. If it finds the request justified, it will return the documentation to the court which issued the judgment, or to the court which has taken its place, together with its decision for a re-trial.

335. *Id.* art. 276:

The trial takes place on the basis of the requested re-trial referred back to it, and if it decides there is no just cause to interfere with the original judgment, it issues a decision accordingly; if however it decides on annulment, either total or partial, and that the person convicted is not guilty, it will issue a new judgment, but this will not be more severe in its sentence than the previous one. Its judgment will be in accordance with legal procedures.

336. *Id.* art. 256; *see supra* note 322.

337. Criminal Procedure Code, art. 273:

The request for a re-trial can only halt implementation of a sentence if it was in respect of [sic] the death penalty.

338. *Id.* art. 276; *see supra* note 335.

339. Criminal Procedure Code, art. 278:

Following the annulment of a judgment, all its civil or criminal consequences are removed, either in total or in part, and the amount of any fine or compensation is

convicted defendant[340]—presumably to allow posthumous exoneration and the concomitant restoration of civil and property rights.

C. Custody and Fines

Sentences run from the date of implementation until noon on the date of release.[341] Time served in pretrial detention may offset either a sentence of imprisonment[342] or a fine. [343] On the other hand, failure to pay a fine may result in the fine being converted to a specific amount of imprisonment time.[344] Sentences of married couples where each spouse is convicted of crimes may, upon request

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returned together with any impounded or confiscated property. If such items are no longer present, their value is paid out, unless the confiscation was not a legal duty.

340. *Id.* art. 277:

If the person convicted has died, or if he dies after the request has been submitted, the court continues with the measures for a re-trial and appoints someone to be responsible for the defence, if the person who requested the re-trial had not already appointed someone to represent his defense. The court then issues its decision not to interfere with the original judgment, or for annulment, either in full or in part, or for a declaration of not guilty on the part of the deceased. Its decision will be in accordance with legal procedures.

341. *Id.* art. 294(A):

The sentence is calculated from the day it is implemented against the convicted until noon on the day he is discharged.

342. *Id.* art. 295:

The period of detention is deducted from the period of the sentence issued against the convicted person for the same offence. If there are several offences within the same case, this period is deducted from the least severe penalty.

343. *Id.* art. 298:

If a person is sentenced to a fine only, and he has already been detained for the offence of which he has been convicted, the amount of the fine can be reduced for every day he was detained. If the person is sentenced to imprisonment and a fine, and the period he spent in detention is longer than the period of the prison sentence, the amount of the fine is to be reduced by one half of one dinar for every extra day served. If the number of days in question adds up to exceed the amount of the fine payable, then the court can decide to discharge him.

344. *Id.* art. 299:

A. If a person is sentenced to a fine, whether or not with imprisonment as well, and he does not pay the money, the court will sentence him to imprisonment for half of the maximum period for the offense concerned, if he was sentenced to both prison and a fine.

B. If an offense was punished by a fine only, the period of imprisonment to which the court can sentence the accused in the event of the fine not being paid is reduced proportionally to the amount outstanding. However the total period of the prison sentence must not exceed 2 years.

C. The prison sentence comes to an end, in the event of non-payment of the fine, upon the discharge of the fine, or a part of it relative to the remainder of the sentence.

D. Payment of the fine, or a portion of it, can be paid to the court, police station or prison administration, and when this happens the convicted person can be discharged immediately.

(and posting of appropriate bail),[345] be ordered to be served consecutively if they have responsibility for a child under twelve years old.[346]

D. Termination of a Criminal Case

With regard to the termination of a case, the Code provides:

> A criminal case is concluded upon the death of the accused, the issue of a guilty or not guilty judgment, or a judgment or decision of diminished responsibility for the offence concerned, or a final decision for discharge of the accused or a pardon, or the permanent cessation of proceedings, or for other reasons stipulated in law.[347]

E. Death Penalty

In capital cases, the condemned is imprisoned pending the final processing of his case.[348] There is an automatic review of the matter by both the Cassation Court and the head of State.[349] An execution may not take place until four months postpartum for a pregnant female,[350] on an official holiday or a religious festival

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345. *Id.* art. 297:
> The decision to postpone implementation of a sentence is issued in accordance with Article 296 by the court which issued the sentence, in response to the request of the convicted person. The court will demand bail to guarantee that he returns to serve the sentence upon expiry of the period of time in question. The court calculates the amount of the bail and includes it in the decision issued granting the postponement of implementation. It is the responsibility of the court to make appropriate arrangements in this way to ensure the convicted person does not run away.

346. *Id.* art. 296:
> If a man and his wife are both awarded custodial sentences for a period of more than one year for different offenses, and they have not been in prison before, implementation of the sentence with regard to one of them can be postponed if they have responsibility for a young child of less than 12 years and they have a fixed place of residence.

347. *Id.* art. 300.

348. *Id.* art. 285(A):
> The person condemned to death is placed in prison until steps have been taken for carrying out the sentence.

349. *Id.* art. 286:
> If the Court of Cassation confirms the death sentence as issued, it will send the case file to the Prime Minister, who is responsible for passing it on to the President of the Republic to seek the necessary decree for carrying out the sentence.
>
> The President of the Republic issues the decree for carrying out the sentence, or for commuting it, or for pardoning the condemned person. If he issues the decree for implementation, the Prime Minister issues an order to that effect, including the decree of the Republic, in accordance with legal provisions.

350. *Id.* art. 287:
> A. If the condemned person is pregnant when the order for implementation arrives, it is the responsibility of the prison administration to inform the head of the Chief Prosecutor to present a notification to the Minister of Justice to delay execution of the sentence, or to reduce it. The Minister of Justice then submits this notification to the President of the Republic. Implementation of the sentence is delayed until another order is issued by the Minister of Justice in accordance

pertinent to the condemned,[351] or until the condemned has made a final confession (if his religion so dictates).[352] The execution is carried out by a reading of the death decree,[353] a taking of any last statement of the condemned,[354] and the hanging—the sole authorized means of execution,[355] followed by the obligatory final paperwork annotating the event.[356] The condemned's relatives are entitled to visit the day before the execution[357] and to receive the body afterward.[358] If they

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with the decision of the President of the Republic. If the renewed order rules for implementation of the death sentence, it is not carried out until four months after the date of delivery of the child, whether the delivery is before or after the arrival of the order.

B. The judgment in sub-paragraph A is applicable to a condemned person whose child is delivered before the arrival of the order for implementation if the period of four months from the date of her confinement has not expired. The sentence is not carried out until four months have elapsed from the date of her confinement, even if the renewed order for implementation arrives.

351. *Id.* art. 290:

The death penalty cannot be carried out on official holidays and special festivals connected with the religion of the condemned person.

352. *Id.* art. 292:

If the religion of the condemned person requires him to make confession before death, the necessary arrangements are to be made for him to meet a cleric of his religion.

353. *Id.* art. 289(A):

The director of the prison reads the Republic decree for the implementation of the sentence to the condemned person at the place of execution, so that the others present can hear.

354. *Id.* art. 289(B):

If the condemned person wishes to make a statement, the judge notes down what is said and this is endorsed by the other members present.

355. *Id.* art. 288:

The sentence of death is carried out by hanging within the prison, or any other place in accordance with the law after the issue of the decree of the President of the Republic for the sentence to be carried out in accordance with Article 286. The execution is witnessed by the Implementation Board, comprising a Misdemeanor Court judge, a member of the Public Prosecution, if available, a representative of the Ministry of the Interior, the director of the prison and the prison doctor, or any other doctor delegated by the Ministry of Health. The accused's legal representative is excused from attendance if he so requests.

356. *Id.* art. 289(C):

Once sentence has been carried out, the director of the prison signs a form, on which he [sic] doctor confirms death, and the time this took place, and the remainder of those resent [sic] sign the document accordingly.

357. *Id.* art. 291:

It is the responsibility of the relatives of the condemned person to visit on the day before sentence is to be carried out. It is the duty of the prison administration to info [sic] them of the date accordingly.

358. *Id.* art. 293:

The corpse of the executed person is handed over to relatives if they so request. Otherwise the prison authorities will carry out the burial at government expense, but there will be no funeral ceremony.

decline to accept the body, it is given an ignominious burial at government expense.[359]

IV. MISCELLANY

The goal of this article has been to provide a broad overview of the investigation and trial process in Iraq. There are some topics, however, that are so esoteric or not germane to that goal as to merit little discussion. Thus, the following have not been discussed at length elsewhere:

- Seizure of a felon's property is authorized.[360] Seizure of an absconded accused felon's property is authorized to induce him to come forward.[361]
- Conciliation, a creature unique to civil law systems (in which the defendant may provide restitution or otherwise provide

359. *Id.*

360. *Id.* arts. 183-86.

361. *Id.* art. 121:

> A. If an arrest warrant issued against the accused for the commission of a felony is not executed, the investigating judge and criminal court may issue an order for the seizure of the moveable and immoveable property of the accused. After execution, papers are immediately sent to the Court of Felony, and if supported by the court, the authorities who decided on the detention will issue a statement, published in the local newspapers, on the television and using other methods of publication as appropriate, which states the name of the accused, the offence of which he is accused and the property which has been seized. It will ask him to give himself up to the nearest police station within 3 days. It will also ask that any person with knowledge of the location of the accused inform the nearest police station. If the Court of Felony does not support it, the seizure is cancelled. If the decree of seizure was issued by the Court Felony [sic], it is implemented, and the statement is issued without need for approval from any other authority.
>
> B. If the accused does not give himself up within the period stipulated, the authorities which issued the decree of seizure will deposit moveable assets with the judicial guard for safekeeping and they will be administered under his supervision. The immoveable assets will be handed over to the Office for Confiscated Property to administer, in its capacity as property with an absentee owner. The property will remain confiscated in this way until the death of the accused is proven; he is sentenced or proved guilty or not liable; he is released; or the complaint against him is dropped. At that point, the property will be returned to him or whoever is the rightful owner.
>
> C. If the property seized will deteriorate quickly or is expensive to maintain, or if the authorities issuing the decree of seizure decide to sell it, it is sold in accordance with the Law of Implementation based on a memo sent to the person in charge of implementation.
>
> D. If the accused gives himself up or is arrested, either the seized property or its value is returned in full.
>
> E. Any person to whom an accused person who has absconded owes money on a legal basis, shall be paid monthly from the seized assets at the same rate as payment was being made before the seizure, by decree of the authorities which issued the decree of seizure.

satisfaction to the complainant, such that the complainant withdraws the complaint), is available in the Iraqi system.[362]

- Misdemeanor Courts ruling in cases involving only a penalty of detention may use the summary trial method in lieu of a more robust trial.[363] The summary process entails hearing the complainant/plaintiff from the associated civil case, hearing the witnesses, reading the reports, and listening to the defendant.[364] There is no formal charging or plea process.[365] Instead, the court issues a verdict—based on whether it "is satisfied" or not that the defendant committed the offense of which he is accused.[366] The maximum punishment that may be issued following a summary trial is the maximum penalty for an infraction as set forth in the Penal Code.[367]
- Iraqi law recognizes a version of the double jeopardy principle: cases that are conclusively final[368] usually may not be relitigated.[369] The exception is those cases in which new evidence is found to show material flaws in the facts presented at trial.[370]

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362. *Id.* arts. 194-98.

363. *Id.* arts. 201-04.

364. *Id.* art. 203(A):

> The process of a [summary] trial entails the court hearing the testimony of the complainant or civil plaintiff, testimony of the witness, reading reports, then hearing a statement from the accused, if in attendance, without any charge being made, and recording a written summary of this, thus covering all aspects of the case.

365. *Id.*

366. *Id.* art. 203(B)-(C):

> B. If the court is satisfied, after taking the steps described in sub-paragraph A, that the accused committed the offense of which he is accused, it issues a guilty verdict and rules on the penalty to be imposed.
>
> C. If the court is satisfied that the accused did not commit the offense of which he is accused, or if there is insufficient evidence for conviction, or if the action which was committed is not a criminal offense, a ruling is made that the accused be released.

367. *Id.* art. 204(C):

> If the court reviews a case of misdemeanor in summary form, it may not give a judgment exceeding the maximum penalty for an infraction as stipulated in the Penal Code.

368. *Id.* art. 300; *see supra* note 347.

369. Criminal Procedure Code, art. 301:

> There cannot be a return to investigation and court proceedings against the accused, for whom the criminal case has been concluded, except under circumstances stipulated in law.

370. *Id.* art. 303:

> The investigation or court proceedings against an accused may be resumed after the criminal case has been closed if, after the issue of the judgment or definitive or final decision, it emerges that there was an act or consequence of the offense for which the accuse was tried, or had proceedings taken against him, which was

- Regardless of the outcome of a particular case, contraband taken from the accused is confiscated.[371] Specific provisions describe the handling of other impounded items, depending on their nature, establishment of ownership, and outcome of the case.[372]

The following subjects are specifically addressed in the Code, but not discussed in this article:

- The relationship of a criminal case to its concomitant civil (tort) case[373]
- Geographic jurisdiction of the IJ/subject matter jurisdiction of investigating authorities[374]
- Bail, and the subsequent confiscation of property in consequence of its violation[375]
- Procedural issues related to investigation of cases committed by juveniles[376]
- Procedures for handling misdemeanor breaches of the peace[377]
- Extradition, foreign service of process, and other extraterritorial issues[378]
- Conditional discharge (probationary parole)[379]
- Cash sureties[380]
- Handling of impounded goods[381]
- Commitment to keep the peace[382]
- Commitment to good behavior (a program where the prosecutor or an investigative judge can recommend that a recidivist or unemployed person be placed on probation or pay a surety in lieu thereof for one to three years)[383]

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fundamentally different from the facts as presented in the trial.

371. *Id.* art. 307:

> The discharge of a case for any lawful reason does not prevent the confiscation of goods whose possession is prohibited in law.

372. *See id.* arts. 308-16.

373. *See id.* arts. 10-29.

374. *See id.* arts. 53-55.

375. The authority of a judge to order or allow bail or a written pledge is covered in Criminal Procedure Code, arts. 95-96. Collateral issues involving the inability to make bail or failure to appear after posting bail are treated at Criminal Procedure Code, arts. 101, 111-22.

376. *See id.* arts. 233-42.

377. *See id.* arts. 321-30.

378. *See id.* arts. 352-68.

379. *See id.* arts. 331-37.

380. *See id.* arts. 325-30.

381. *See id.* arts. 308-16.

382. *See id.* arts. 317-20.

383. *See id.* arts. 321-24.

- Pardon[384]

Finally, it is simply impossible, in an article of this nature, to address the myriad of non-Code issues that impact directly the administration of justice in the Iraqi system. Thus, I have consciously avoided a discussion of the hierarchical structure of the court system, and the many changes the Coalition Provision Authority made to Iraqi criminal procedure law, including the elimination of the death penalty (which was subsequently reinstated by the Council of Representatives). I have also chosen to avoid any significant reference to the substantive penal laws of Iraq—or even to the categorization of crimes into felonies, misdemeanors, and infractions.

384. *See id.* arts. 338-41.

CRITICAL COMPARISONS: THE ROLE OF COMPARATIVE LAW IN INVESTMENT TREATY ARBITRATION

VALENTINA VADI*

A rose is a rose is an onion

Ernest Hemingway, *For Whom the Bell Tolls* (1940)

Both comparativists and internationalists have mostly neglected the interaction between international law and comparative law. While "[i]nternationalists seem comfortable with power and uncomfortable with culture . . . comparativists are eager for cultural understanding and wary of involvement with governance."[1] However, this attitude is gradually changing, as comparativists and internationalists have increasingly acknowledged that they "share more than they realize."[2] This article aims to scrutinize the interplay between international investment law and comparative law. This interaction has four different but related dimensions: comparative investment law, comparative arbitration law, legal doctrine, and treaty interpretation. While authors have extensively studied comparative investment law and comparative arbitration law, which study the different national legislations regulating foreign investment and the arbitral process, investment law scholarship and arbitral tribunals' use of comparative law has received scarce, if any, attention.

While the use of comparative legal reasoning in investment law jurisprudence and legal scholarship seems to offer concrete solutions to emerging conceptual dilemmas and reputed scholars have forcefully argued in favor of it, one may question whether a more critical approach to the use of comparative law should be adopted. It is often assumed that comparative law is a neutral process, but this is

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1. David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545, 633 (1997).

2. *Id.* at 557.

not always the case. Problems of perspective are a central element in the comparative law discourse. This study focuses on the interplay between international investment law and comparative law and proposes the adoption of a critical method. Not only would such awareness limit eventual abuses of the comparative method, but it would also favour the coherence of the international legal system as a whole.

I. INTRODUCTION

Not many fields of law use comparative law as extensively as international arbitration. International arbitration is a method for settling transnational disputes, involving parties and adjudicators of different nationalities, and requiring the application of different sets of procedural and substantive norms. For its intrinsic characteristics, international arbitration constitutes the *Walhalla* for comparative law experts, and indeed, an eminent arbitrator, Professor Pierre Lalive, has recently recognized that "the main duty of the international arbitrator is to be open to other cultures" and that "[i]n order for international arbitrators to avoid culture clashes, universities should start training law students much more in international and *comparative law*."[3] In a previous study he affirmed that "an international arbitration should be decided by a truly 'international' arbitrator, i.e. someone who is *more* than a national lawyer, someone who is internationally-minded, trained in comparative law and inclined to adopt a *comparative and truly 'international outlook.'*"[4]

While many comparative lawyers have therefore analyzed international arbitration through comparative law lenses,[5] investment treaty arbitration has received scarce if any attention. This neglect may be due to several interlinked reasons. First, investment-treaty arbitration is often associated with international arbitration. Second, the boom of investment disputes has only a very recent pedigree. Consequently, only recently have authors analyzed the phenomenon of investment treaty arbitration. Third, given the relative scarcity of legal doctrine, it is logical that comparative law scholars have not had the necessary inputs to start scrutinizing this particular area of public international law.

However, some have highlighted the distinction between investment treaty arbitration and international commercial arbitration.[6] While international

3. Sarah Dookhun, *Q&A with Professor Pierre Lalive*, 3 GLOBAL ARBITRATION REVIEW 5, 3 (2008), *available at* http://www.lcil.cam.ac.uk/Media/lectures/pdf/Lalive-QandA.pdf (emphasis added).

4. Pierre Lalive, *On the Neutrality of the Arbitrator and of the Place of Arbitration*, *in* RECUEIL DE TRAVAUX SUISSES SUR L'ARBITRAGE INTERNATIONAL 23, 27 (Claude Reymond & Eugène Bucher eds., 1984) (emphasis added).

5. JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION v-vi (Stephen V. Berti & Annette Ponti trans., 2d ed. 2007); JULIAN LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 2-3 (2003); *see also* Andreas F. Lowenfeld, *Two-Way Mirror: International Arbitration as Comparative Procedure*, 7 MICH. Y.B. INT'L LEGAL STUD. 163 (1985) (deeming international arbitration as an exercise in comparative procedure).

6. *See* Nigel Blackaby, *Investment Arbitration and Commercial Arbitration (or the Tale of the Dolphin and the Shark)*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 217, 217-19 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006); Jan Paulsson, *International Arbitration is Not Arbitration*, 2 STOCKHOLM INT'L ARB. REV. 1 (2008) *available at* http://www.arbitration-

arbitration generally involves private parties and concerns disputes of a commercial nature, investment treaty arbitration involves states and private actors.[7] This "diagonal" dispute settlement mechanism is a major novelty in international law since international disputes have traditionally involved states only.[8] In this sense, investment arbitration represents a successful means to ensure access to justice at the international level. Because of the peculiar character of investment treaty arbitration and the recent proliferation of investment disputes, the role of comparative law in investment treaty arbitration requires an autonomous analysis.[9] This scrutiny is not only theoretically interesting but also concretely useful in light of the increasing criticisms on investment treaty arbitration. Investment treaty disputes mainly involve public law adjudication and may have a deep impact on public welfare. Some authors have pointed out the inadequacies of arbitration, which is historically rooted in private law, to deal with disputes involving public law.[10] This essay aims at exploring the role that comparative law may play in investment treaty arbitration and questions whether the use of comparative law may help solve some aspects of the "legitimacy crisis" of investment treaty arbitration.[11]

The argument shall proceed as follows: First, the characteristics of investment-treaty arbitration shall be highlighted. Second, this contribution will scrutinize some essential features of the comparative method. Only by knowing the merits and limits of the comparative method can interpreters and adjudicators make an appropriate use of it. Third, this study focuses on the interplay between international investment law and comparative law. While several studies have

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icca.org/media/0/12331138275470/siar_2008-2_paulsson.pdf; Giuditta Cordero Moss, *Commercial Arbitration and Investment Arbitration: Fertile Soil for False Friends?*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY-ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 782, 782-84 (Christina Binder et al. eds., 2009).

7. Moss, *supra* note 6, at 784-93.

8. Paulsson, *supra* note 6, at 5-6.

9. U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2006 - FROM DEVELOPING AND TRANSITION ECONOMIES: IMPLICATIONS FOR DEVELOPMENT at 29, U.N. Sales No. E.06.II.D.11 (2006), *available at* http://www.unctad.org/en/docs/wir2006_en.pdf. According to the UNCTAD, a total of 226 investment treaty arbitrations had been brought during the period 1987-2006. The number of investor state arbitrations, however, is only approximate, because disputes might be unknown because of the confidentiality requirements. About two thirds of these arbitrations have been filed since the beginning of 2002 alone.

10. Gus Van Harten, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2007).

11. Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471, 473 (2009) (discussing the "legitimacy crisis" of investment treaty arbitration); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1521 (2005); M. Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, *in* APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES LAW 39 (Karl P. Sauvant ed., 2008); Joachim Karl, *International Investment Arbitration: A Threat to State Sovereignty?*, *in* REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW 225, 232-38 (Wenhua Shan et al. eds., 2008); Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419 (2000).

focused on what may be called comparative investment law,[12] much less attention has been paid to the use of comparative law within investment treaty arbitration. This phenomenon deserves close scrutiny because investment treaty tribunals use the comparative method in their reasoning. Arbitral tribunals refer to the jurisprudence of other international courts and tribunals, the precedents of other investment tribunals,[13] or even to national precedents. The paper will assess the functioning of such a "judicial borrowing" and conclude with some reflections on the important role that comparative law may play in "legitimizing" investment treaty arbitration. By furthering the judicial dialogue among international courts and tribunals, legal transplants may constitute a key element to insert human rights considerations into investment treaty arbitration, and have the potential for ultimately promoting the humanization of international law.

II. INVESTMENT TREATY ARBITRATION

While international investment law is one of the most ancient areas of public international law, investment treaty arbitration is a recent phenomenon.[14] When the International Centre for the Settlement of Investment Disputes (ICSID) was first established in 1966[15] it was hardly foreseen that it would in due course become one of the most active international tribunals, before which there are now more than 130 cases pending.[16] None could predict that investment treaty arbitration would move "from a matter of peripheral academic interest to a matter of vital international concern."[17] Most contemporary investment treaties include investor-state arbitration for the settlement of disputes which may arise between the foreign investor and the host state.[18] Under this mechanism, foreign investors may bring

12. *See infra* Section IV.

13. There is no such rule as binding precedent in international law. *See* Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0 (stating that a "decision of the Court has no binding force except between the parties and in respect of that particular case.") [hereinafter ICJ Statute].

14. *See* Southern Pacific Properties (Middle East) Ltd. v. Egypt, ICSID Case No. ARB/84/3, Decision on Jurisdiction (Nov. 27, 1985), 3 ICSID Rep. 131 (1995) (upholding the validity of an ICSID clause under Egyptian law); *see also* ANDREW NEWCOMBE AND LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES –STANDARDS OF TREATMENT 45 (2009) (explaining that the Chad-Italy BIT marked "the true beginning of modern BIT practice" and gives an accurate historical overview).

15. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States arts. 1-3, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

16. *List of Pending Cases*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending (last visited Sep. 24, 2010).

17. Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 435 (2009).

18. *See* David Sedlak, *ICSID's Resurgence in International Investment Arbitration: Can the Momentum Hold?*, 23 PENN ST. INT'L L. REV. 147 (2004) (arguing that investor-state arbitration has become a standard feature in international investment treaties since the 1980's, and such mechanism has been used increasingly. From 1995 to 2004 ICSID registered four times as many claims as in the previous 30 years and the growth rate appears increasing in the last five years. The ICSID renaissance is probably due to economic globalization and the proliferation of investment treaties. There seems to be a parallel growth in other fora, but data is not available because of the confidentiality requirements. Also, some disputes may be unknown because settled before registration).

claims against the host state before international arbitral tribunals.[19] This development has transformed the landscape of modern investment protection,[20] as customary international law did not confer such a right to individuals.[21] Similarly, Friendship, Commerce and Navigation (FCN) treaties and investment treaties that pre-dated the establishment of the ICSID only provided for State-to-State disputes.[22] In contrast with this traditional paradigm of states as the only subjects of international law and the only ones having the capacity to raise international claims against other states in legal proceedings, modern investment treaties do not require the intervention of the home state in the furtherance of the dispute.[23] Private companies no longer depend on the discretion of their home states in the context of diplomatic protection as to whether a claim should be raised against another state.[24]

Suggestively described as "arbitration without privity,"[25] the internationalization of investment disputes guarantees a neutral forum and has thus been conceived as an important valve for adequately recognizing and protecting the assets of foreign investors from expropriation, host state nationalization or other forms of regulation. Through arbitration clauses the host state signatory to the treaty agrees in advance to arbitrate disputes, at the investor's initiative, over the treaty meaning and application.[26] Such clauses are to some degree necessary to render meaningful the more substantive investment treaty provisions. By themselves, treaty based provisions are meaningless if they are not accompanied by an effective dispute settlement mechanism. As the late Professor Thomas Wälde once held, "it is the ability to access a tribunal outside the sway of the host state which is the principal advantage of a modern investment treaty . . . . The effectiveness of substantive rights is . . . linked to the availability of an effective enforcement . . . . Right and procedural remedy, are, in practical and effective terms, one."[27]

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19. *Id.* at 153-54.

20. *See* CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 5 (2007); JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 3 (2005).

21. *See* JOHN COLLIER & VAUGHAN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES 1-15 (1999); *see also* Peter Muchlinski, *The Diplomatic Protection of Foreign Investors: A Tale of Judicial Caution*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY-ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 341 (Christina Binder et al. eds., 2009).

22. Herman Walker, Jr., *Modern Treaties of Friendship, Commerce, and Navigation*, 42 MINN. L. REV. 805, 805 (1957).

23. *See* NEWCOMBE & PARADELL, *supra* note 14, at 44-45.

24. *See* M. SORNARAJAH, THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES 61-84 (2000); Karl-Heinz Böckstiegel, *Arbitration of Foreign Investment Disputes- An Introduction*, *in* NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 125, 125-31 (Albert Jan van den Berg ed., 2005).

25. Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. - FOREIGN INVESTMENT L.J. 232, 256 (1995), *available at* http://www.arbitration-icca.org/media/0/12254614477540/jasp_article_-_arbitration_without_privity.pdf.

26. Böckstiegel, *supra* note 24, at 126.

27. Thomas Wälde, *The "Umbrella" (or Sanctity of Contract/Pacta sunt Servanda) Clause in*

Importantly, the paradigm shift is significant in a further respect. In investor-state arbitration there is a transfer of adjudicative authority from national courts to arbitral tribunals. In this sense, it has been argued that access to investor-state arbitration shares many characteristics of the direct right of action before human rights courts.[28] However, arbitral tribunals do not only constitute an additional forum with respect to State courts, but also an alternative to the same.[29] Thus, not only can foreign investors seek another decision after an eventual recourse to the national courts, but they are not required to exhaust local remedies prior to pursuing an international legal claim. This is in stark contrast to international human rights treaties which require that claimants exhaust local remedies in the first instance.[30] Even where contracts between an enterprise and a state expressly limit recourse to local dispute settlement options, claimants can directly surmount national jurisdictions and bring investment claims to arbitral tribunals in situations where the investor's home state and the host state have a BIT in place.[31] Under most investment treaties, states have waived their sovereign immunity and have agreed to give arbitrators comprehensive jurisdiction over what are essentially regulatory disputes. Indeed, investment treaty arbitration encompasses the full panoply of the state's regulatory relations with foreign investors. As a result, some have pointed out that investment treaty arbitration would replace judicial organs with private adjudicators in matters of public law.[32]

Since investment arbitration presents characteristics similar to those in a typical international commercial arbitration, these features may become

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Investment Arbitration: A Comment on Original Intentions and Recent Cases, 1 TRANSNAT'L DISP. MGMT 4, 13 (2004); Karl-Heinz Böckstiegel, *Enterprise v. State: The New David and Goliath? – The Clayton Utz Lecture*, 23 ARB. INT'L 93 (2007) (noting that the traditional David-Goliath relationship between private investors and states has been replaced, at least procedurally, by a level playing field and that in some circumstances, private claimants, as large multinational companies, may well have more resources available than small state being a respondent).

28. *See* ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 1-10 (2009) (Describing the similarity between the situation of private persons claiming international protection of human rights before the ECtHR, private enterprises hold individual procedural and substantive rights in international investment law); *see* Clara Reiner & Christoph Schreuer, *Human Rights and International Investment Arbitration, Human Rights in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION 82-97, 94 (Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann eds., 2009).

29. *See* DOUGLAS, *supra* note 28, at 9.

30. Office of the U.N. High Comm'r for Human Rights, Human Rights Treaty Bodies – Individual Communications, Procedure for complaints by individuals under the human rights treaties, http://www2.ohchr.org/english/bodies/petitions/individual.htm (last visited Oct. 10, 2010).

31. Several recent ICSID cases have upheld jurisdiction to hear treaty claims, notwithstanding the fact that the foreign investor was party to a contract which specified that contract claims would be the exclusive province of a given domestic court. *See* Compañia de Aguas del Aconquija S.A. & Vivendi Universal v. Arg. Republic, ICSID Case No. ARB/97/3, Annulment Decision, ¶ 119 (July 3, 2002), 41 I.L.M. 1135, 1159 (2002), *available at* http://ita.law.uvic.ca/documents/vivendi_annulEN.pdf; CMS Gas Transmission Co. v. Arg. Republic, ICSID Case No. ARB/01/8, Decision on Jurisdiction, (July 17, 2003), 42 I.L.M. 788, 808 (2003), *available at* http://ita.law.uvic.ca/documents/cms-argentina_000.pdf; Noble Ventures, Inc. v. Rom. ICSID Case No. ARB/01/11, Award, ¶¶ 40-62 (Oct. 12, 2005), *available at* http://ita.law.uvic.ca/documents/Noble.pdf.

32. *See* Gus Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 INT'L & COMP. L. Q. 371, 383 (2007).

problematic with regard to regulatory disputes.[33] For instance, the parties determine the composition of the arbitral tribunal.[34] Although the right to choose an arbitrator may be considered the very essence of arbitration,[35] this may be problematic from a public policy perspective. As an author highlights, while "arbitrators . . . are expected to be both independent of the party appointing them and impartial . . . it is usually conceded that without violating in any way this theoretical obligation of independence, the arbitrator may quite acceptably share the nationality, or political or economic philosophy, or 'legal culture' of the party who has nominated him—and may therefore be supposed from the very beginning to be 'sympathetic' to that party's contentions or 'favorably disposed' to its positions."[36] In a sense, independence and neutrality very much depend on the personality of the arbitrator.[37]

Confidentiality is another feature of the arbitral process. Hearings are held *in camera* and final awards may not be published, depending on the parties' will. Even the names of the parties and much less the details of the dispute may not be disclosed.[38] While confidentiality well suits commercial disputes, the same may be problematic in investor-state arbitration. The lack of transparency may hamper efforts to track investment treaty disputes, to monitor their frequency, their settlement and to assess the policy implications that flow thereby.[39] In recent years, some efforts to make investment arbitration more transparent have been undertaken in different fora. In response to calls from civil society groups, the three parties to the North American Free Trade Agreement (NAFTA) - Canada, the US, and Mexico - have pledged to disclose all NAFTA arbitrations and open future arbitration hearings to the public.[40] Similarly, the ICSID Rules provide for the

33. Blackaby, *supra* note 6.

34. Pierre Lalive, *Conclusions*, *in* THE ARBITRAL PROCESS AND THE INDEPENDENCE OF ARBITRATORS 119, 123
(1991).

35. *See id.*

36. Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 506-07 (1997).

37. Arbitrators have clear incentives to adopt a high level standard of conduct because of reputation. *See* Andreas Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, TEX. INT'L L.J. 59 (1995).

38. For instance, Article 46 of the 2010 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce provides that unless otherwise agreed by the parties, the SCC Institute and the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award. Arb. Inst. of the Stockholm Chamber of Commerce, Arb. Rules of the Arb. Inst. of the Stockholm Chamber of Commerce art. 46 (Jan. 1, 2010), *available at* http://www.sccinstitute.com/skilje domsregler-4.aspx.

39. Because investment disputes are settled using a variety of arbitral rules-not all of which provide for public disclosure of claims-there can be no accurate accounting of all such disputes. That some portion of the iceberg remains hidden from view should be a matter of concern given the public policy implications of such disputes. Luke Eric Peterson, *Bilateral Investment Treaties and Development Policy-Making*, INT'L INST. FOR SUSTAINABLE DEV. 15 (2004), *available at* http://www.iisd.org/pdf/2004/trade_bits.pdf.

40. *See*, NAFTA Free Trade Commission, Joint Statement, Montreal (Oct. 7, 2003), http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/Statement.aspx?lang=eng (last visited Nov. 1, 2010).

public disclosure of the dispute proceedings under their auspices.[41] Increasingly, investment arbitration tribunals have allowed public interest groups to present *amicus curiae* briefs or have access to the arbitral process. These important moves, however, involve the conduct of the proceedings of a limited number of investment disputes. Indeed, the vast majority of existing treaties do not mandate such transparency, which means that most of the proceedings are resolved behind closed doors.

Finally, and perhaps more importantly, awards rendered against host states are, in theory, readily enforceable against host state property worldwide, due to the widespread adoption of the New York and Washington (ICSID) Conventions.[42] The decisions have only limited avenues for revision and cannot be amended by the domestic legal system or a supreme court.[43] Arbitration under the ICSID rules is wholly exempted from the supervision of local courts, with awards subject only to an internal annulment process.[44]

Some important issues arise in this context. On the one hand, it seems that the current framework lacks adequate procedural protection for the public interest. According to some authors, investment treaty law and arbitration would be facing a "legitimacy crisis,"[45] as "private tribunals consider legal issues that impact the international economy, public policy and international relations, but they do so in a vacuum."[46] On the other hand, there is uncertainty over the relevance or irrelevance of norms external to investment law within investment treaty arbitration. Furthermore, notwithstanding the substantive similarity of investment treaty provisions, arbitral tribunals have come to inconsistent decisions on the meaning of international law norms. Inconsistent arbitral awards create legal uncertainty and undermine the coherence of the international legal system.

While developing countries have deemed investment treaty arbitration politically biased against them,[47] emerging economies and industrialized countries

41. ICSID Convention, Regulations and Rules, Int'l Ctr. For Settlement of Inv. Disputes, at 66 (Apr. 2006), *available at* http://icsid.worldbank.org/ ICSID /ICSID/ RulesMain.jsp.

42. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 1, June 10, 1958, 330 U.N.T.S. 38 [hereinafter New York Convention]; ICSID Convention, *supra* note 15, art. 54.

43. New York Convention, *supra* note 42, art. 6; ICSID Convention, *supra* note 15, art. 53.

44. ICSID Convention, *supra* note 15, art. 53. The ICSID annulment process provides for a very limited review. ICSID annulment committees only have the ability to annul awards and send them back to the tribunal or to a new tribunal for a new decision, but cannot replace the decision with their own. The grounds for annulment are very narrow and concern due process issues: the tribunal was not properly constituted, it manifestly exceeded its powers, there was corruption on the part of a member, there was a fundamental serious departure from a procedural rule, or the award did not state the reasons on which it was based.

45. On the "legitimacy crisis" of investor-state arbitration, *see supra* note 11.

46. Franck, *supra* note 11, at 1521.

47. Shalakany, *supra* note 11. More recently, the Bolivian President Evo Morales affirmed that Bolivia "emphatically reject[s] the legal, media and diplomatic pressure of some multinationals that . . . resist the sovereign rulings of countries, making threats and initiating suits in international arbitration," adding that "The governments of Latin America . . . never win the cases." *Latin Leftists Mull Quitting World Bank Arbitrator*, REUTERS, Apr. 30, 2007, http://www.reuters.com/article/worldnews/idUSN29

alike have expressed some concerns about this mechanism. For instance, Australia has not been at ease with the idea of investment-related arbitrations, and the investment chapter of the Australia-US Free Trade Agreement leaves out provisions on investor-state dispute resolution.[48] In the European Union (EU), the compatibility of the current investment law and EU law is highly debated. The criticisms concern alleged discriminatory treatment of investors and a perceived lack of control by the European Court of Justice (ECJ) due to arbitration.[49] Turning our attention to developing countries, Bolivia and Ecuador sent a formal notice to ICSID declaring their withdrawal from the ICSID Convention and their intention to pursue revisions to their BITs in order to direct investors' claims solely to domestic fora.[50] These moves may be due to contingent political reasons.[51] Furthermore, the fear of expensive investment disputes may be an additional reason for withdrawal. However, these moves may also indicate a deeper dissatisfaction with how the system works.

Before addressing these criticisms, two preliminary observations may be made. First, it seems that the emerging criticisms on the functioning of investment treaty arbitration in relation to public goods are evidence of the vitality of the system. The recent boom of investment treaty arbitrations, as well as the willingness of states to participate in the system, explain such vitality. For instance, the EU Member states are willing to maintain the network of BITs that exists between them despite the above-mentioned concerns of the European Commission.[52] Indeed, EU states believe that their investors are better protected

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48. William S. Dodge, *Investor-State Dispute Settlement between Developed Countries: Reflections on the Australia-United States Free Trade Agreement*, 39 VAND. J. TRANSNAT'L L. 1, 2 (2006).

49. Opinion of the Advocate General Poiares Maduro, delivered on July 10, 2008, Comm'n of the European Communities. v Republic of Austria, Case No. C-205/06, 2009 E.C.R. I-01301, and Comm'n of the European Communities. v Kingdom of Sweden, Case No. C-249/06 , 2009 2 C.M.L.R. 49, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006C0205:EN:HTML.

50. International Center for Settlement of Investment Disputes, ICSID News Release, *Bolivia Submits a Notice Under Article 71 of the ICSID Convention*, May 16, 2007, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3; International Center for Settlement of Investment Disputes, ICSID News Release, *Ecuador Submits a Notice Under Article 71 of the ICSID Convention*, July 9, 2009, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Annouancement20.

51. For instance, in the case of the US Australia FTA, the parties have shown reciprocal trust of the respective national courts. Andrew L. Stoler, AUSFTA as "Third Wave" Trade Agreement: Beyond the WTO Envelope, Address at the 26th International Trade Law Conference, at 5, (Sept. 23, 2004), *available at* http://www.iit.adelaide.edu.au/conf/AGC92304_ausfta_SpD.pdf.In the case of Bolivia and Ecuador, the withdrawal from ICSID may be due to the nationalization drive in the Andean gas sector which is firmly supported by the poorest indigenous minorities. *See* Marco E. Schnabl & Julie Bédard, *The Wrong Kind of 'Interesting': The Investment Climate in Latin America Recalls a Certain Chinese Proverb*, NAT'L L.J., July 30, 2007, *available at* http://www.arbitralwomen.org/files/publication/1910231238362.pdf.

52. The European Commission fears that such parallel regime may create legal uncertainty and forum shopping in favour of arbitration. Damon Vis-Dumbar, *EU Member States Reject the Call to*

under the BITs than under EU law alone.[53] Second, the emerging critiques should constitute the steppingstones for the progressive development of the system.[54] These criticisms need to be taken into account to allow the investment treaty system to evolve in a harmonious way.[55] Comparative law is an element that can make it easier for the public good to be taken into account in investment treaty arbitration.

III. COMPARATIVE LAW AND METHOD

Before exploring the role the comparative method plays in the context of investment treaty law and arbitration, it is worth scrutinizing the main characteristics of comparative law. In a preliminary way, two questions need to be addressed. The first question relates to the essence of comparative law: is comparative law a legal discipline or should it be considered a mere legal method? The second question, which is strictly related to the first, is about the objectives of comparative law. Due to space limits, this section does not purport to exhaustively describe what the comparative method does and what those employing it should do to use it properly. The very existence of comparative law as a legal discipline has been contested because of lack of agreement among scholars on the appropriate use of analogy in legal context. The main assumption of this paper is that the controversial nature of comparative law does not repress its legal nature; by way of contrast, the awareness of its limits and merits may only benefit legal analysis. In this sense, while it is not possible to offer a prescriptive analysis of comparative law — because the same comparative law scholars have different views on the method of comparative law — this section aims to offer some insights on the essence of comparative law, its *modus operandi*, and its purposes.

Comparative law has been defined as "an intellectual activity with law as its object and comparison as its process."[56] Notwithstanding the apparent clarity of this definition, there has been a fierce debate among scholars with regard to the essence of comparative law. While some authors have qualified comparative law as an autonomous discipline, others have contended that comparative law

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Terminate Intra-EU Bilateral Investment Treaties, INV. TREATY NEWS, Feb. 10, 2009, http://www.investmenttreatynews.org/cms/news/archive/2009/02/10/eu-member-states-reject-the-call-to-terminate-intra-eu-bilateral-investment-treaties.aspx.

53. *Id.* Provisions like the Fair and Equitable Treatment standard do not appear in national legislations or even in EC law. Other provisions, such as those concerning expropriation may be stricter in investment treaties than in national laws. More importantly, investment treaty arbitration is a procedural guarantee that EU law does not provide for. Granting investors an independent right to initiate dispute settlement directly against the host state instead of forcing them to rely either on domestic courts or on inter state dispute resolution is one of the major 'virtues' of international investment law.

54. *See* Anne Van Aaken, *Perils of Success? The Case of International Investment Protection*, 9 EUR. BUS. ORG. L. REV. 1 (2008).

55. Francisco Orrego Vicuña, *Carlos Calvo, Honorary NAFTA Citizen*, 11 N.Y.U. ENVT'L. L.J. 19, 32-34 (2002).

56. KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 2 (Tony Weir, trans., 3rd ed. 1998).

amounted to the mere utilization of the comparative method.[57] Without delving into the depth of the different schools of thought, it seems that nowadays the autonomy of comparative law as a science is established.[58] Not only is comparative law a subject studied in many universities around the world, but some basic texts are almost uniformly adopted worldwide.[59] At the same time, no one could contest the existence of the comparative method as a tool for relating different objects and disciplines. Metaphors and comparisons are essential to comprehend new concepts and organize thought.[60] Therefore, the famous dilemma — whether comparative law is a discipline or a method — is a false dichotomy, because comparative law is an autonomous discipline based on the comparative method.[61] Discourse on method is essential because it clarifies the tools of the discipline and its objectives. More importantly, to keep in mind the co-existence of both discipline and method helps the scholar apply the comparative method to new subject areas, eventually contributing to the expansion of comparative law.

The main characteristics of comparative law originate from the fact that it does not focus on a mere legal system, but on two or more systems of law.[62] This does not necessarily imply that comparative law is a mere theoretical exercise. On the contrary, comparative law often adopts a functionalist approach and may have very concrete outcomes. Comparative law explores how a concrete problem is solved in different jurisdictions and may constitute a useful tool for the construction or amendment of legal systems. Comparative law has an evolutionary or dynamic dimension in that it may stimulate change.

There are two main criticisms against comparative law. The first relates to the scientific rigour of the discipline. Authors highlight that comparative law may be superficial, as it necessarily investigates two or more legal systems rather than focusing on one. Furthermore, authors have questioned whether a lawyer trained in a certain legal system may truly understand another system without pre-judging it according to the legal categories that constitute her legal imprinting.[63] According

57. W.J. Kamba, *Comparative Law a Theoretical Framework*, 23 INT'L & COMP. L. Q. 485, 486-87 (1974), *quoting* Kahn-Freund, *Comparative Law as an Academic Subject*, 82 LAW Q. REV. 40 (1966) (explaining that comparative law "has by common consent the somewhat unusual characteristic that it does not exist"); *see* Djalil Kiekbaev, *Comparative Law: Method, Science or Educational Discipline?*, 7.3 ELECTRONIC J. COMP. L. (Sept. 2003), http://www.ejcl.org/73/art73-2.html (discussing the different approaches of comparative law).

58. Comparative law became an autonomous legal discipline at the end of the XIX century. ALESSANDRO PIZZORUSSO, SISTEMI GIURIDICI COMPARATI 145 (2d ed. 1998); Marc Ancel, *Comment aborder le droit comparé (A propos d'une nouvelle "Introduction au droit comparé")*, *in* ÉTUDES OFFERTES A RENE RODIERE 3 (1981).

59. ZWEIGERT & KÖTZ, *supra* note 56, at v (noting that the "*Introduction to Comparative Law* now has more readers outside Germany than inside it").

60. *See* ESIN ÖRÜCÜ, THE ENIGMA OF COMPARATIVE LAW - VARIATIONS ON A THEME FOR THE TWENTY-FIRST CENTURY 11 (2004) (stating that, "Comparison is the essence of understanding").

61. *Id.* at 1 (explaining that there "is no one single definition of what comparative law and comparative method are.").

62. *Id.*

63. Ferdinand Joseph Maria Feldbrugge, *Sociological Research Methods and Comparative Law*, *in* BUTS ET METHODS DU DROIT COMPARE/AIMS AND METHODS OF COMPARATIVE LAW 211, 214

to this line of thought, being raised in a certain legal tradition or culture determines certain procedural or substantive choices.[64]

The second criticism relates to the comparative method. It is claimed that depending on the perspective adopted, comparisons may have completely different outcomes. In other words, where one stands on any particular issue is nearly always dependent upon where one sits.[65] In comparing two elements, scholars may confuse the two instead of keeping them separate.[66] Although the idea of a neutral referent or *tertium comparationis* may seem attractive in theory, it may become misleading in practice. An example may clarify the issue at stake. Let us imagine a debate on the shade of color *alpha* which is neither black nor red. Is *alpha* a *red* color with a black glance or is it a *black* color with a red glance? Some may even hypothesize that the essence of *alpha* is violet. Whatever the shade, it is evident that if *alpha* is compared to other red colors, it will look black; while if it is compared to black colors, it will look red. Instead, if *alpha* is compared to black and red colors all together, its shade will appear similar to purple. In conclusion, depending on the particular perspective adopted, the results of the comparative process may be very different.

These criticisms have the merit of showing certain limits and risks of comparative law. The interpreter must be aware of the perspective selected to avoid the risks mentioned above. For instance, with regard to the breadth of the discipline, one may well focus on certain aspects, leaving other aspects to subsequent studies. With regard to the constitutive bias of any legal scholar trained in a certain legal system, this question may have become moot in practice. It is not rare that scholars are trained in two or more jurisdictions and are therefore exposed to more than one legal culture. Globalization has globalized legal careers.[67] The fact that scholars often speak one or more foreign languages facilitates access to

(Rotondi ed., 1973); Günter Frankenberg, *Critical Comparisons: Rethinking Comparative Law*, 26 HARV. INT'L L.J. 411, 415 (1985) (referring to the "skeptical assumption that objective comparison is impossible because the compara[t]ist's vision is totally determined by her specific historical and social experience and perspective").

64. *See* Richard Kreindler, *Arbitration or Litigation? ADR Issues in Transnational Disputes*, 52 DISP. RESOL. J. 79, 79 (1997); Amanda Stallard, Note, *Joining the Culture Club: Examining Cultural Context When Implementing International Dispute Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 463 (2002).

65. Similarly, with regard to the International Court of Justice, the "data suggest[s] that national bias has an important influence on the decision making of the ICJ. Judges vote for their home states about 90 percent of the time. When their home states are not involved, judges vote for states that are similar to their home states--along the dimensions of wealth, culture and political regime." Eric A. Posner & Miguel F. P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 624 (2005).

66. Talking about comparisons, Wittgenstein pointed out the great risk of confusing the prototype with the object of comparison, which we are viewing in its light. LUDWIG WITTGENSTEIN, CULTURE AND VALUE 14 (G.H. Von Wright ed., Peter Winch trans., 1980).

67. As Tom Ginsburg puts it, " [g]lobalization leads to pressure on legal cultures . . . national legal cultures that were more or less autonomous are now subject to a variety of external pressures because of the growing rate of cross-national interaction." Tom Ginsburg, *The Culture of Arbitration*, 36 VAND. J. TRANSNAT'L L. 1335, 1337 (2003).

primary sources. Furthermore, the willingness to understand and to appreciate the particular features of a foreign system should not be perceived as a form of naiveté but as a humble attempt to decipher a certain system and to contribute to the development of comparative law, and possibly of the examined legal systems themselves. With regard to the methodological problem of confusing the *elementa comparationis*, this problem does not exist in comparative law alone, but it appears as soon as analogies are drawn.

In conclusion, to argue that the comparative method is useless because it is a risky enterprise would go too far. The comparative method requires both audacity and carefulness: the mapping of foreign lands requires certain methodological choices and the selection of a particular scale and perspective. What seems important is not the adoption of a particular perspective, but the awareness that the comparative method may lead to different results, and therefore, the perspective adopted needs to be spelled out at the outset.[68] Much more critical work needs to be done.

IV. THE INTERPLAY BETWEEN INVESTMENT LAW AND COMPARATIVE LAW

Comparativists and internationalists alike have almost entirely neglected the interaction between international law and comparative law. As Professor Kennedy once put it, "[i]nternationalists seem comfortable with power and uncomfortable with culture, while comparativists are eager for cultural understanding and wary of involvement with governance."[69] However, this attitude is gradually changing. On the one hand, comparativists have highlighted that the traditional focus of comparative law on national systems is old fashioned and they have argued that comparative law should integrate the most important transnational regimes.[70] On the other hand, internationalists have similarly emphasized that "[t]he internationalist and comparativist share more than they realize."[71] It is a matter of time, but it may be foreseen that the interplay between international law and comparative law will receive increasing attention. This paper aims to contribute to this emerging area of study by focusing on the linkage between international investment law, which is a sub-system of international law and comparative law. This interaction has four different but related dimensions: 1) comparative investment law; 2) comparative arbitration law; 3) legal doctrine; and 4) treaty interpretation. The following sub-sections highlight these four paths. While the first two dimensions are only briefly mentioned, and reference to the relevant literature is made, the role of comparative law in legal doctrine and treaty interpretation is analyzed in more detail.

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68. *See infra* Section IV.

69. Kennedy, *supra* note 1, at 633. Kennedy also remarked, "For the comparativist, internationalists seem rather vulgar presentists, always wanting lessons and applications and solutions . . . For the internationalist, the comparativist seems a snob or a dilettante . . . ." *Id.* at 556-57.

70. Mathias Reimann, *Beyond National Systems: A Comparative Law for the International Age*, 75 TUL. L. REV. 1103, 1119 (2001).

71. Kennedy, *supra* note 1, at 557.

A. Comparative Investment Law

The national legal frameworks regulating foreign investment may be studied through comparative lenses.[72] This field of enquiry can be called *comparative investment law*, and refers to the study and comparison of the different legal frameworks regulating foreign investment at the national and/or regional levels. A number of authors have investigated comparative investment law.[73] From an international law perspective, however, this approach has only limited merit, because it focuses on national investment codes. While these national codes often reflect and implement international law norms, they maintain a national character as national lawmakers have elaborated on them and national courts have adjudicated them.

B. Comparative Arbitration Law

Comparative lawyers have studied international arbitration as a paradigmatic melting pot of legal cultures. Professor Ginsburg highlighted that international arbitration constitutes "a place of convergence and interchange wherein practitioners from different backgrounds create new practices."[74] Others have stressed that the emerging arbitration culture fuses together elements of the common law and civil law tradition.[75] From an international law perspective, these studies provide international law scholars with important theoretical and logical tools for their profession.

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72. Some authors have focused on the adoption by national legislatures of models from foreign statutes. *See* Daphne Barak-Erez, *An International Community of Legislatures?*, *in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 532, 532 (Richard W. Bauman & Tsvi Kahana eds., 2006); Helen Xanthaki, *Legal Transplants in Legislation: Defusing the Trap*, 57 INT'L & COMP. L.Q. 659 (2008).

73. Jean-Yves P. Steyt, Comparative Foreign Investment Law: Determinants of the Legal Framework and the Level of Openness and Attractiveness of Host Economies (May 2006) (LLM dissertation, Cornell Law School), *available at* http://scholarship.law.cornell.edu/lps_LLMGRP/1/; L. Yves Fortier, *The Canadian Approach to Investment Protection: How Far Have We Come!*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY- ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 525-43 (Christina Binder et al. eds., 2009); Michael Mikiciuk, *Foreign Direct Investment Success in Ireland: Can Poland Duplicate Ireland's Economic Success Based on Foreign Direct Investment Policies?*, 14 U. MIAMI INT'L & COMP. L. REV. 65 (2006); Amanda Perry-Kessaris, *Finding and Facing Facts about Legal Systems and FDI in South Asia*, 23 LEGAL STUD. 649 (2003); AMANDA J. PERRY, LEGAL SYSTEMS AS DETERMINANT OF FOREIGN DIRECT INVESTMENT: LESSONS FROM SRI LANKA (2001); Amanda J. Perry, *Effective Legal Systems and Foreign Direct Investment: In Search of the Evidence*, 49 INT'L & COMP. L.Q. 779 (2000); Antonio R. Parra, *Principles Governing Foreign Investment, as Reflected in National Investment Codes*, *in* IBRAHIM F.I. SHIHATA, LEGAL TREATMENT OF FOREIGN INVESTMENT: THE WORLD BANK GUIDELINES 311 (1993); Jürgen Voss, *The Protection and Promotion of Foreign Direct Investment in Developing Countries: Interests, Interdependencies, Intricacies*, 31 INT'L & COMP. L. Q. 686 (1982).

74. *See* Ginsburg, *supra* note 67, at 1335.

75. *See* Christian Borris, *The Reconciliation of Conflicts Between Common Law and Civil Law Principles in the Arbitration Process*, *in* CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS 1, 1 (Stefan N. Frommel & Barry A.K. Rider eds., 1999).

C. Legal Doctrine

In scrutinizing investment law and arbitration, scholars have made use of the comparative method, albeit in an implicit manner. Since scholars belonging to different legal cultures produce international legal doctrine, it is inevitable that this scholarship reflects its multicultural origin and different approaches. Reference to national and regional case law is a constant feature in articles concerning international investment law and this does not necessarily reflect a form of nationalism, as reference is often done to the case law of other countries as well.[76]

This particular interaction between comparative law and investment law scholarship is of particular relevance because in international law, the opinion of legal scholars is deemed to have a certain, albeit subsidiary, legal value. The Statute of the International Court of Justice (ICJ) expressly enumerates "the teachings of the most highly qualified publicists of the various nations" as "subsidiary means for the determination of the sources of law."[77] On the one hand, as Oppenheim clarified more than a century ago, "the writers on international law . . . have to pronounce whether there is an established custom or not, whether there is a usage only in contradistinction to a custom, whether a recognized usage has now ripened into a custom, and the like."[78] On the other hand, international law scholars "have to ascertain the precise meaning of [the written] rules with the help of interpretation."[79]

With regard to international arbitration, Ginsburg highlighted that "[l]ike the grand civil law tradition, it is scholarly commentary that produces the law and technique of arbitration."[80] With regard to investment treaty arbitration, the influence of scholarly analysis is of utmost importance. On the one hand, scholars and professors of international law are often selected as arbitrators in investment treaty disputes.[81] Therefore, it may be expected that their academic experience is somehow drawn upon in the settlement of the dispute. On the other hand, both

76. For instance, while the Tecmed Tribunal relied on ECtHR cases, none of the members of the Tribunal were Europeans. *See* Walid Ben Hamida, *Investment Arbitration and Human Rights*, 4 TRANSNAT'L DISP. MGMT. 5, 14 (2007).

77. ICJ Statute, *supra* note 13, art. 38(1)(d). The ICJ Statute is annexed to the Charter of the United Nations of which it forms an integral part. U.N. Charter, June 26, 1945, 1 U.N.T.S. XVI.

78. Lassa Oppenheim, *The Science of International Law: Its Task and Method*, 2 AM. J. INT'L L. 313, 315 (1908).

79. *Id.* at 315.

80. *See* Ginsburg, *supra* note 67, at 1341-42.

81. For instance, in *Thunderbird Gaming Corp. v. United Mexican States*, the late Professor Wälde, acting as an arbitrator, stated that the proper analogy in interpreting investment treaties is not to international commercial arbitration or public international law, both of which involve disputants who are seen as equals, but rather to judicial review relating to governmental conduct. Additionally, "[m]ore appropriate for investor-state arbitration are analogies with judicial review relating to governmental conduct – be it international judicial review (as carried out by the WTO dispute panels and Appellate Body, by the European- or Inter-American Human Rights Courts or the European Court of Justice) or national administrative courts judging disputes of individual citizens' over alleged abuse by public bodies of their governmental powers." Int'l Thunderbird Gaming Corp. v. United Mexican States, 255 Fed. Appx. 531 (2007) (separate opinion of arbitrator Thomas Wälde, at 13, *available at* http://www.naftaclaims.com/Disputes/Mexico/Thunderbird/Thunderbird_Dissent.pdf).

advocates and arbitrators make reference to the works of scholars in their pleadings and awards respectively.[82] Finally, as an arbitrator has emphasized, "[a]wards are there to be evaluated and criticized –relentlessly criticized — in the interest of improving international legal systems."[83]

Academics have contributed to the development of international investment law through both *macro-comparisons* and *micro-comparisons*.[84] With regard to macro-comparison, authors have compared international investment law and arbitration to different legal systems. For instance, investment treaty law has been compared to administrative law[85] and other sets of international law.[86]

With regard to micro-comparison, authors have compared specific investment treaty standards to rules belonging to other legal orders.[87] In certain cases,

82. For instance, in his separate opinion to the Thunderbird case, Professor Wälde made reference to Professor Gaillard's work: "Emmanuel Gaillard, Jurisprudence du CIRDI, 2004, at 7." *Id.* at 13, n.7. In the *Malaysian Historical Salvors SDN BHD v. the Government of Malaysia*, the ad hoc committee cited the work of Professor Christoph Schreuer (citing CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY (2001)) and Yulia Andreeva (citing Yulia Andreeva, *Salvaging or Sinking the Investment? MHS v Malaysia Revisited, in* THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS vol. 7, no. 2, at 161 (2008)). *Malaysian Historical Salvors SDN BHD v. Gov't of Malay.*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶¶ 67, 76 (Feb. 28, 2009), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1030_En&caseId=C247.

83. Jan Paulsson, *Awards – and Awards, in* INVESTMENT TREATY LAW CURRENT ISSUES III: REMEDIES IN INTERNATIONAL INVESTMENT LAW, EMERGING JURISPRUDENCE OF INTERNATIONAL INVESTMENT LAW 97, 98 (Andrea K. Bjorklund et al. eds., 2009).

84. While micro-comparison "has to do with specific legal institutions or problems", macro-comparison aims to "compare the spirit and style of different legal systems, the methods of thought and procedures . . . for resolving and deciding disputes, or the roles of those engaged in the law." ZWEIGERT & KÖTZ, *supra* note 56, at 4-5.

85. Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. OF INT'L L. 121 (2006); GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2007) (the core argument of the book lies in the accurate analogy between investment treaty arbitration and administrative courts); Gus Van Harten, *A Case for an International Investment Court*, Society of International Economic Law (SIEL) Inaugural Conference 2008 Paper (June 30, 2008).

86. August Reinisch & Loretta Malintoppi, *Methods of Dispute Resolution, in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 691 (PETER MUCHLINSKI et al. eds., 2008); Christian Tomuschat, *The European Court of Human Rights and Investment Protection, in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY 636 (Christina Binder et al. eds., 2009).

87. The list of possible examples is endless. *See* NICK GALLUS, THE TEMPORAL SCOPE OF INVESTMENT PROTECTION TREATIES 20-21 (2008) (comparing the rule against retroactivity used by investment tribunals to that used by other international tribunals including the International Court of Justice, the Inter-American Court of Human Rights and the European Court of Human Rights); John Y. Gotanda, *Assessing Damages in International Commercial Arbitration: A Comparison with Investment Treaty Disputes, in* INVESTMENT TREATY LAW CURRENT ISSUE III: REMEDIES IN INTERNATIONAL INVESTMENT LAW, EMERGING JURISPRUDENCE OF INTERNATIONAL INVESTMENT LAW 77 (Andrea K. Bjorklund et al. eds., 2009); Jürgen Kurtz, *National Treatment, Foreign Investment and Regulatory Autonomy: The Search for Protectionism or Something More?, in* NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 311 (Philippe Kahn & Thomas Wälde eds., 2007) (comparing the doctrinal evolution on national treatment in investment treaty law with that of GATT Article III (4) under WTO law); Sylvie Tabet, *Application de l'obligation de traitement national et de traitement de la nation la plus favorisée dans la jurisprudence arbitrale en matière d'investissement - Nouveaux problèmes à la*

international legal scholarship has advocated a proactive use of comparative law in the course of arbitral proceedings. For instance, an author made reference to a WTO case to critically assess the application of the Most Favored Nation (MFN) to investor state arbitration.[88] In an interesting contribution on the fair and equitable treatment (FET), another author has advocated an extensive use of the comparative method, arguing that only by comparing the FET standard with the national articulations of the Rule of Law, can the meaning of the standard become concrete:

> Instead of primarily relying on prior arbitral decisions, an approach that is little helpful in particular when disputes concern novel circumstances, or positing the content of the fair and equitable treatment in an abstract way without sufficient justification, tribunals should use a comparative method that draws on domestic and international law regarding the concept of the rule of law.[89]

Other authors have similarly advocated an extensive use of national precedents with regard to the interpretation of the notion of expropriation. For instance, on the theme of regulatory expropriation and environmental protection, Wälde and Kolo argued that the jurisprudence of the US Supreme Court could represent a valid persuasive precedent for investment treaty tribunals.[90] Since investment treaty tribunals are analogous to administrative tribunals or constitutional courts, the case law of the US Supreme Court would serve as useful guidance for arbitral tribunals.

While these functionalist approaches seem to offer concrete solutions to emerging conceptual dilemmas, and highly reputed scholars have forcefully presented such dilemmas, one may question whether a more critical approach to the use of comparative law should be adopted. While scholarly analysis has made extensive use of comparative law, and has deemed it a panacea for solving interpretative dilemmas, methodology issues have been neglected.

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lumière de la jurisprudence de l'OMC, *in* NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 352 (Philippe Kahn & Thomas Wälde eds., 2007). Perhaps the area of international investment law where the use of analogy has been more expansively adopted is the concept of property. *See, e.g.*, Christoph Schreuer & Ursula Kriebaum, *The Concept of Property in Human Rights Law and International Investment Law*, *in* HUMAN RIGHTS, DEMOCRACY AND THE RULE OF LAW: LIBER AMICORUM LUZIUS WILDHABER 743 (S. Breitenmoser et al. eds., 2007); Hélène Ruiz Fabri, *The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for Regulatory Expropriations of the Property of Foreign Investors*, 11 N.Y.U. ENVT'L L.J. 148 (2002).

88. *See* Walid Ben Hamida, *MFN Clause and Procedural Rights: Seeking Solutions from WTO Experience?*, 6 TRANSNAT'L DISP. MGMT 1 (2009). *See also* Jürgen Kurtz, *The Use and Abuse of WTO Law in Investor - State Arbitration: Competition and its Discontents*' (2009) 20 EUR. J. INT'L L. 749, 749-71 (2009); Nicholas Di Mascio & Joost Pauwelyn, *Non Discrimination in Trade and Investment Treaties: Two Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48 (2008).

89. Stephan W. Schill, *Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law* 29 (New York University Law School, International Law & Justice Working Paper No. 6, 2006), *available at* http://www.iilj.org/publications/documents/2006-6-GAL-Schill-web.pdf (last visited June 16, 2010).

90. Thomas Wälde & Abba Kolo, *Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law*, 50 INT'L & COMP. L. Q. 811, 821 (2001).

It is often assumed that comparative law is a neutral process, but this is not always the case. The very selection of the *elementa comparationis* may affect the outcome of a case. For instance, the *Lauder* case[91] and the *CME* case[92]— which were parallel proceedings over the same underlying dispute – had different outcomes because different BITs governed the substantive law and the arbitral tribunals gave different weight to the comparative method. While the *Lauder* Tribunal referred to a human rights case for establishing the expropriation standards,[93] the other Tribunal did not. As an author put it, "one is left to wonder, therefore, whether this would explain how the two tribunals came to . . . opposite decisions."[94]

Another example may clarify the issues at stake. The ICSID Convention and other arbitral rules leave arbitral tribunals a wide discretion with regard to costs.[95] In the *Thunderbird* case, in deciding how to allocate the costs for legal representation, Professor Wälde argued that "[t]he judicial practice *most comparable* to treaty-based investor-state arbitration is the judicial recourse available to individuals against states under the European Convention on Human Rights; again, states have to defray their own legal representation expenditures, even if they prevail."[96] By contrast, in the *Europe Cement* case, the Arbitral Tribunal awarded the respondent full costs to "compensat[e] the Respondent for having to defend a claim that had no jurisdictional basis and discourage others from pursuing such unmeritorious claims."[97] Authors have pointed out that "[r]ecently, some tribunals [in investment arbitration] have adopted . . . the principle that the successful party should have its costs paid by the unsuccessful party, *as adopted in commercial arbitration.*"[98] This example clearly shows that

91. Lauder v. Czech Rep., Final Award (Sept. 3, 2001), 9 ICSID Rep. 66 (2001), *available at* http://ita.law.uvic.ca/documents/LauderAward.pdf.

92. CME Czech Rep. B.V. v. Czech Rep., Partial Award, (Sept. 13, 2001), *available at* http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf; CME Czech Rep. B.V. v. Czech Rep., Final Award (Mar. 14, 2003), 9 ICSID Rep. 121 (2003), *available at* http://ita.law.uvic.ca/documents/CME-2003-Final_001.pdf.

93. Lauder v. Czech Rep., *supra* note 91, at ¶ 200 (quoting Mellacher v. Austria, 169 Eur. Ct. H.R. (ser. A) (1989)).

94. James D. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity*, 18 DUKE J. COMP. & INT'L L. 77, 84 (2007).

95. ICSID Convention, *supra* note 15, art. 61(2).

96. Int'l Thunderbird Gaming Corp. v. United Mexican States, 255 Fed. Appx. 531, ¶ 141 (2007) (separate opinion of arbitrator Thomas Wälde, at 13, *available at* http://www.naftaclaims.com/Disputes/Mexico/Thunderbird/Thunderbird_Dissent.pdf) (emphasis added).

97. Europe Cement Investment & Trade S.A. v. Republic of Turk., ICSID Case No. ARB(AF)/07/2, Award, ¶ 185 (Aug. 7, 2009), *available at* http://arbitration.fr/resources/ICSID-ARB-AF-07-2.pdf. It is worth noting that the sentence is borrowed from an eminent scholar, Professor Schreuer, who similarly wrote that such an award "serves the purposes of compensating the victorious party and of dissuading unmeritorious claims". *Id.* at ¶ 182. Professor Schreuer's position on the matter reflects the practice adopted in commercial arbitration, and in several national systems. See, for instance, Article 91 of the Italian code of civil procedure.

98. ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. Republic of Hung., ICSID Case No. ARB/03/16, Award, ¶ 532 (Sept. 27, 2006), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC648_En&caseId=C231 (quoting

depending on which material is selected for comparison, the outcome may be different.

D. Treaty Interpretation

A *fourth* area of intersection between investment law and comparative law is seen in the increasing cross-fertilization between different international tribunals. This trend may be called "global comparative jurisprudence," and reflects the fact that international tribunals look to the decisions of other international bodies on related or analogous matters. The reliance of both phenomena on the use of analogy ties judicial borrowing to comparative law. Analogy is a cognitive process which transfers an argument from one particular to another particular. Analogy plays a significant role in comparisons, which are the core element of judicial borrowing. Unlike commercial arbitrators who apply different laws depending on the subject matter of the disputes, investment treaty arbitrators apply a limited number of concepts under public international law. The focus of arbitral tribunals is on both the concepts they are applying and on the decisions of other tribunals.

Indeed, while arbitral tribunals have limited jurisdiction, their authority to engage in judicial borrowing derives from the fluid nature of international law. In international law, Article 38(d) of the ICJ Statute considers judicial decisions as "subsidiary means for the determination of rules of law."[99] In parallel, systemic interpretation is a customary tool of treaty interpretation.[100] In addition, the consistent interpretation and application of certain treaty norms may consolidate in the *opinio juris* necessary to transform a certain treaty provision into customary international law. Finally, certain investment treaty provisions, such as Fair and Equitable Treatment, present an obvious analogy with equity as a general principle of law under the regime set out in Article 38(c) of the ICJ Statute.

Investment arbitral tribunals have made extensive use of systematic interpretation, referring to the jurisprudence of previous arbitral tribunals, national administrative and constitutional courts on the one hand, and to the case law of regional human rights courts and international courts and tribunals on the other. As arbitrators have made use of comparative arguments albeit implicitly, it seems crucial to map the current dimension of the phenomenon and to propose a more conscious use of the comparative method. The unaware use of the comparative method may determine the abuse of the same, and ultimately lead to undesirable outcomes. Arbitrators risk acting as "bricoleurs" rather than as "engineers" of legal norms:[101] "As engineers, they would sort through the concepts and assemble them into a constitutional design that made sense according to some overarching conceptual scheme. As bricoleurs, though, they . . . use the first thing that happens

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Matthew Weiniger & Matthew Page, *Treaty Arbitration and Investment Dispute: Adding Up the Costs*, 1 GLOBAL ARB. REV. 3, 44 (2006)).

99. ICJ Statute, *supra* note 13, art. 38(1)(d).

100. Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT].

101. The metaphor is borrowed from Lévi-Strauss. Mark Tushnet, *The Possibilities of Comparative Law*, 108 YALE L.J. 1225, 1285-86 (1999).

to fit the immediate problem they are facing."[102] Since the use of the comparative method in international investment arbitration may have a great impact on the development of international investment law and international law in general, a more conscious use of the comparative method needs to be promoted.

V. THE USE OF THE COMPARATIVE METHOD IN INVESTMENT TREATY ARBITRATION

While authors have extensively focused on the impact of comparative law on the procedural aspects of international adjudication,[103] scarce attention has been paid to the impact comparative law may have on the substantive aspects of the same. While notable contributions scrutinized the phenomenon of judicial borrowing in areas such as human rights adjudication,[104] the use of comparative law *per se* in investment treaty arbitration has never been the object of a specific study. Therefore, this is the first attempt to chart the substantive world of investment treaty arbitration through the lenses of comparative law.[105] The following analysis aims at clarifying an ongoing process and its main characteristics. For limits of space, this analysis cannot be exhaustive; further study will be required to complete the mapping of this complex landscape.

In a preliminary way, interpretation is a fundamental part of the implementing process of a treaty. Whatever the conception of the adjudicative function that arbitrators adopt, it is generally accepted that adjudicators are neither mere *bouche de la loi*, nor authentic law makers.[106] In a sense, arbitrators have a *maieutic* role,

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102. *Id.* at 1286.

103. *See* CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION (2007). Regarding international arbitration, *see* Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313 (2003); Borris, *supra* note 75; Andreas F. Lowenfeld, *International Arbitration as Omelette: What Goes into the Mix*, *in* CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS 19 (Stefan N. Frommel & Barry A.K. Rider eds., 1999); Serge Lazareff, *International Arbitration: Towards a Common Procedural Approach*, *in* CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS 31 (Stefan N. Frommel & Barry A.K. Rider eds., 1999).

104. *See* Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391 (2007); Christopher McCrudden, *Judicial Comparativism and Human Rights*, *in* COMPARATIVE LAW: A HANDBOOK 371 (Esin Orücü & David Nelsen eds., 2007); David Schneiderman, *Property Rights and Regulatory Innovation: Comparing Constitutional Cultures*, 4 INT'L J. CONST. L. 371 (2006); Darren Rosemblum, *Internalizing Gender: Why International Law Theory Should Adopt Comparative Methods*, 45 COLUM. J. TRANSNAT'L L. 759 (2007); Sujit Choudhry, *Globalization is Search of Justification: Towards a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999).

105. In previous contributions, I have analyzed the merit of judicial borrowing with regard to investment treaty disputes involving cultural elements and intellectual property rights respectively. *See* Valentina Vadi, *Fragmentation or Cohesion? Investment versus Cultural Protection Rules*, 10 J. WORLD INV. & TRADE 573 (2009); Valentina Vadi, *Cultural Heritage & International Investment Law: A Stormy Relationship*, 15 INT'L J. CULTURAL PROP. 1 (2008); Valentina Vadi, *Mapping Uncharted Waters: Intellectual Property Disputes with Public Health Elements in Investor-State Arbitration*, 6 TRANSNAT'L DISP. MGMT. 2 (2009); Valentina Vadi, *Trademark Protection, Public Health and International Investment Law: Strains and Paradoxes*, 20 EUR. J. INT'L L. 773 (2009).

106. For more on the different conceptions of the adjudicative function, *see* Ernst-Ulrich Petersmann, *Introduction and Summary: 'Administration of Justice' in International Investment Law and Adjudication?*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 3, 9-11

as they give birth to the meaning of treaty provisions, having to identify the applicable rules, clarify their meaning and relate them to the specific facts of the case. According to the International Law Commission, "the interpretation of documents is to some extent an art, not an exact science."[107] However, to say that adjudicators' roles are creative would probably be going too far, because it would undermine their legitimacy.

Customary rules of treaty interpretation, as restated in the Vienna Convention on the Law of Treaties (VCLT),[108] provide the adjudicators with the necessary conceptual and legal framework to perform their function to settle disputes "in conformity with the principles of justice and international law."[109] Customary rules of treaty interpretation are applicable to investment treaties because investment treaties are international law treaties. Furthermore, some investment treaties expressly mention these rules.[110] According to the *general rule of interpretation*, which comprises several sub-norms, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[111]

Although the VCLT does not make reference to cases, these may be considered as "supplementary means of interpretation."[112] As mentioned above, the ICJ Statute includes cases among the "subsidiary means for the determination of rules of law."[113] In most cases, as Professor Schreuer highlights, *conversations across cases* take place,[114] and a systemic study of the case law of international tribunals suggests the "tendency to chart a coherent course within international law."[115] Looking at the arbitral awards, there is not only a sort of *endogenous path coherence* by which arbitrators look at previous arbitral awards, but also an increasingly *heterogeneous path coherence* by which arbitrators look at the jurisprudence of other international courts.[116]

The use of the comparative method in investment treaty arbitration is a frequent phenomenon because investment treaties generally tend to converge and often present similar if not identical wording. Furthermore, international

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(P.M. Dupuy et al. eds., 2009).

107. Int'l L. Comm'n, *Draft Articles on the Law of Treaties: Text as Finally Adopted by the Commission on 18 July 1966*, 2 Y.B. Int'l L. Comm'n 218, U.N. Doc. A/CN.4/190.

108. VCLT, *supra* note 100.

109. *Id.* at Preamble.

110. *See, e.g.*, Australia United States Free Trade Agreement art. 21.9(2), U.S.-Austl., May 18, 2004, 118 Stat. 919, *available at* http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/index.html.

111. VCLT, *supra* note 100, art. 31(1).

112. Supplementary methods of interpretation include, but are not limited to, the circumstances of the conclusion of a treaty and preparatory work. VCLT, *supra* note 100, art. 32.

113. ICJ Statute, *supra* note 13, art. 38(1)(b).

114. Christoph Schreuer & Matthew Weiniger, *Conversations Across Cases - Is There a Doctrine of Precedent in Investment Arbitration?*, 5 TRANSNAT'L DISP. MGMT. 3 (2008).

115. Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMP. L. Q. 279, 289 (2005).

116. Valentina Vadi, *Towards Arbitral Path Coherence & Judicial Borrowing: Persuasive Precedent in Investment Arbitration*, 5 TRANSNAT'L DISP. MGMT. 1, 1-16 (2008).

investment law often presents analogies and overlaps with other international law sub-systems, regional law and even national law. Consequently, one may identify three main streams of comparative reasoning. First, arbitrators often refer to previous arbitral awards. Second, arbitrators refer to other international or regional cases. Third, they refer to national cases. The following sub-sections will scrutinize these three streams.

A. Reference to Previous Arbitral Awards

Investment arbitration tribunals are increasingly making reference to previous arbitral awards. This creates a sort of endogenous coherence (i.e., a coherence which is internal to international investment law). The fact that most countries, especially the industrialized ones, have predisposed Model BITs to streamline and simplify the negotiating process facilitates the process. On the one hand, these treaties often reaffirm rules of customary law. On the other hand, similar treaty provisions are gradually coalescing and becoming part of customary law.[117] This phenomenon has a major, notable consequence: when interpreting and applying investment treaty provisions, arbitral tribunals, albeit selected on a *ad hoc* basis, are substantively applying the "common law" of investment protection, a law which is common to the international community as a whole.

While the rule of *stare decisis*, or binding precedent, does not apply to international arbitration and more generally to international disputes,[118] arbitrators refer to previous awards. In the recent case *Europe Cement Investment & Trade S.A v. Republic of Turkey*,[119] the Arbitral Tribunal considered the possibility of issuing moral damages, making reference to the *Desert Line* case.[120] In the *Feldman Karpa* case, the Tribunal reaffirmed that a tribunal award has no binding force except between the parties and in respect of a particular case. However, "in view of the fact that both of the parties in this proceeding have extensively cited and relied upon some of the earlier decisions, the Tribunal believe[d] it appropriate to discuss briefly relevant aspects of earlier decisions . . . ."[121] In the *Saipem* case,

117. *See* Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123, 128-30 (2003).

118. For instance, previous panel and Appellate Body decisions in WTO dispute settlement constitute non-binding precedent. *See* Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845, 849-52 (1999); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 J. TRANSNAT'L L. & POL'Y 1, 1 (1999); Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT'L L. REV. 873, 876 (2001). However, the Appellate Body in *US-Stainless Steel*, required panels to advance "cogent reasons" to justify departure from its previous decisions, thus gradually expanding the quasi-binding force of its decisions. *See* Appellate Body Report, *United States - Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 160, WT/DS344/AB/R (April 30, 2008), *available at* http://www.worldtradelaw.net/reports/wtoab/us-stainlessmexico(ab).pdf.

119. Europe Cement Investment & Trade S.A. v. Republic of Turk., ICSID Case No. ARB(AF)/07/2, Award (Aug. 7, 2009), *available at* http://arbitration.fr/resources/ICSID-ARB-AF-07-2.pdf.

120. *Id.* at ¶ 178 (citing Desert Line Project LLC v. Republic of Yemen, ICSID Case No. ARB/05/07, Award (Feb. 6, 2008), *available at* http://ita.law.uvic.ca/documents/DesertLine.pdf).

121. Feldman v. United Mexican States, ICSID Case No. ARB(AF)/9901, Award on Merits (Dec.

after stating that previous decisions were not binding, the Tribunal held that it had to pay due consideration to earlier decisions of international tribunals:

> [The Tribunal] believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.[122]

B. Reference to the Case Law of Other International Courts and Tribunals

Arbitrators do refer to the decisions of other international or regional courts and tribunals. This form of judicial borrowing creates heterogeneous path coherence, a dynamic process which may lead to a sort of judicial globalization,[123] or the development of a "common law of international adjudication."[124] Professor Slaughter, who first identified the twin issues of global community of courts and global jurisprudence,[125] highlights the development of *judicial comity*, a set of principles guiding courts in giving deference to foreign courts "as a matter of respect owed by judges to judges, rather than of the more general respect owed by one nation to another."[126] Judicial transplant is particularly useful to cope with systemic lacunae of a given legal system. As a comparative lawyer once put it, "transplanting is, in fact, the most fertile source of development" as the "insertion of an alien rul[ing] into another . . . system may cause it to operate in a fresh way."[127]

With regard to investment arbitration, judicial borrowing has been particularly useful in interpreting and clarifying human rights concepts. As Justice Claire L'Hereux-Dubé of the Canadian Supreme Court once said: "More and more courts . . . are looking to the judgments of other jurisdictions, particularly when making decisions on human rights issues. Deciding on applicable legal principles and solutions increasingly involves a consideration of the approaches that have been adopted with regard to similar legal problems elsewhere."[128] Cross-fertilization and judicial dialogue have created an important body of global jurisprudence.[129] As

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16, 2002), *available at* http://ita.law.uvic.ca/documents/feldman_mexico-award-english.pdf.

122. Saipem S.p.A. v. People's Republic of Bangl., ICSID Case No. ARB/05/7, Award, ¶ 90 (June 30, 2009), *available at* http://ita.law.uvic.ca/documents/SaipemBangladeshAwardJune3009_002.pdf.

123. Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1103 (2000).

124. *See* BROWN, *supra* note 103, at 4-5.

125. Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 193 (2003).

126. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 67 (2004). For more on judicial comity, see also W. T. Worster, *Competition and Comity in the Fragmentation of International Law*, 34 BROOK. J. INT'L L. 119 (2008-09).

127. ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 95, 116 (2d ed. 2003).

128. Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 16 (1998).

129. When judges do cite foreign decisions as persuasive authority and they follow similar

Slaughter highlights: "Increasing cross-fertilization of ideas and precedents among constitutional judges around the world is gradually giving rise to increasingly visible international consensus on various issues – a consensus that, in turn, carries its own compelling weight."[130] The universal recognition of human rights requires judges to take human rights into consideration in the settlement of disputes "in conformity with the principles of justice and international law," as prescribed in the preamble of the Vienna Convention on the Law of Treaties.[131]

Investment treaty tribunals have often referred to the decisions of other international courts for guidance. The Iran-U.S. Claims Tribunal has been a useful source of reference for arbitral tribunals.[132] The Tribunal, which was established to resolve the political crisis between Iran and the United States in 1979, has decided *inter alia* claims which arose out of expropriations or other measures affecting property rights. Because of the comparability of the subject matter, arbitral tribunals have referred to its case law with regard to some key issues such as regulatory expropriation. For instance, in *Saipem v. Bangladesh*, the Arbitral Tribunal made reference to a case of the Iran-U.S. Claims Tribunal to hold that a state can expropriate immaterial rights.[133] In his Separate Opinion in the *Thunderbird* case, professor Wälde made reference to the Iran-US Tribunal' s practice with regard to the award of attorney costs.[134]

ICSID Tribunals have extensively referred to decisions of the ICJ[135] and its predecessor, the Permanent Court of International Justice.[136] Indeed, public

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reasoning, cross-fertilization evolves in something deeper resembling an emerging global jurisprudence. *See* McCrudden, *supra* note 104, at 393-94.

130. Slaughter, *supra* note 126, at 78.

131. Ernst-Ulrich Petersmann, *Judging Judges: Do Judges Meet Their Constitutional Obligation to Settle Disputes in Conformity with 'Principles of Justice and International Law'?*, 1 EUR. J. LEGAL STUD. 1 (2007).

132. The political crisis between Iran and the United States arose when 52 United States nationals were detained at the United States Embassy in Tehran in November 1979 and the United States subsequently froze Iranian assets. The Tribunal was established out of the Algiers Accords of January 19, 1981. The literature on the Iran U.S. Tribunal is extensive. *See* CHRISTOPHER R. DRAHOZAL & CHRISTOPHER S. GIBSON, THE IRAN-U.S. CLAIMS TRIBUNAL AT 25: THE CASES EVERYONE NEEDS TO KNOW FOR INVESTOR-STATE & INTERNATIONAL ARBITRATION (2009).

133. Saipem S.p.A. v. People's Republic of Bangl., ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 130 (Mar. 21, 2007), *available at* http://ita.law.uvic.ca/documents/Saipem-Bangladesh-Jurisdiction.pdf (citing Phillips Petroleum Company Iran v. Islamic Republic of Iran, 21 Iran-U.S. Cl. Trib. Rep. 79 (1989)).

134. Int'l Thunderbird Gaming Corp. v. United Mexican States, 255 Fed. Appx. 531 (2007) (separate opinion of arbitrator Thomas Wälde, at ¶ 140, *available at* http://www.naftaclaims.com/Disputes/Mexico/Thunderbird/Thunderbird_Dissent.pdf) (quoting *Sylvania v Iran*, 8 Iran-US CTR 298, 324 (1985)).

135. For instance, in *Maffezini v. Spain*, the Tribunal referred to the ICJ decision *Rights of Nationals of America in Morocco* (France v. United States) when deciding on the scope of protection of the MFN clause. Maffezini v. Spain, ICSID Case No. ARB/97/7, Award on Jurisdiction, ¶¶ 43-50 (Jan. 25, 2000), *available at* http://ita.law.uvic.ca/documents/Maffezini-Jurisdiction-English_001.pdf.

136. LG&E Energy Corp. v. Arg. Republic, ICSID Case No. ARB/02/1, Award, ¶ 11 (July 25, 2007), *available at* http://ita.law.uvic.ca/documents/LGEEnglish_006.pdf. The Permanent Court of International Justice was established by the Covenant of the League of Nations. It held its inaugural sitting in 1922 and was dissolved in 1946. The work of the PCIJ, the first permanent international

international law can be considered the legal framework or system of which international investment law is a sub-system. Before the inception of investment treaty arbitration, investment treaties provided for an interstate process only; governments therefore had to "sponsor" private claims. Nowadays, recourse to diplomatic protection has become "residual,"[137] and primarily international investment treaties, rather than customary international law alone, now protect foreign investors. Against this background, arbitral tribunals still take into account the case law of the ICJ and PCIJ to clarify the meaning of legal concepts. A notable example relates the nationality issue.[138] In *Soufraki v. United Arab Emirates*, the Arbitral Tribunal referred to the *Nottebohm* case (*Liechtenstein v. Guatemala*) when discussing the question of the nationality of the claimant.[139]

However, other arbitral tribunals refer to the *dicta* of international tribunals as a starting point for further enquiry. For instance, in the *Europe Cement* case,[140] when the respondent alleged that the claimant had abused the process and requested declaratory relief (i.e., a declaration that there had been such abuse), the Arbitral Tribunal stated: "Declaratory relief is a common form of relief in international tribunals in state-to-state cases, but no cases were cited to us of tribunals established under the ICSID Convention. . . or under international investment treaties more generally where declarations were granted as a form of relief."[141] In conclusion, the Tribunal acknowledged that declaratory relief had been used in the *Corfu Channel Case* and the *Rainbow Warrior Case*,[142] but it also questioned whether previous arbitral tribunals had adopted such declaration. In

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tribunal with general jurisdiction, made possible the clarification of a number of aspects of international law, and contributed to its development. *See* Antonio S. de Bustamante Y Sirven, *The Permanent Court of International Justice* 9 MINN. L. REV. 240 (1924-1925); OLE SPIERMANN, INTERNATIONAL LEGAL ARGUMENTS IN THE PERMANENT COURT OF INTERNATIONAL JUSTICE: THE RISE OF THE INTERNATIONAL JUDICIARY (2005).

137. While in the seventies, the ICJ in the *Barcelona Traction* case found it "surprising" that the evolution of international investment law had not gone further in the light of the expansion of economic activities in the preceding half century, in the more recent *Diallo* case, the Court has recognized the residual nature of the exercise of diplomatic protection and recourse to the Court in case of investment disputes. These different obiter dicta reflect the recent flourishing of investment treaties and investment treaty arbitration. Barcelona Traction, Light & Power Company, Limited (Belg. v. Spain), 1970 I.C.J. 3, at ¶ 89 (Feb 5); Case Concerning Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), (Preliminary Objections), at ¶¶ 88-91 (Judgment of May 24, 2007), *available at* http://www.icj-cij.org/docket/files/103/13856.pdf.

138. The nationality issue concerns the determination of the nationality of the claimant. *See* ICSID Convention, *supra* note 15, art. 25.

139. Hussein Nuaman Soufraki v. U.A.E., ICSID Case No. ARB/02/7, Decision on Jurisdiction, ¶ 45 (July 7, 2004), *available at* http://ita.law.uvic.ca/documents/Soufraki_000.pdf.

140. Europe Cement Investment & Trade S.A. v. Republic of Turk., ICSID Case No. ARB(AF)/07/2, Award (Aug. 7, 2009), *available at* http://arbitration.fr/resources/ICSID-ARB-AF-07-2.pdf.

141. *Id.* at ¶ 148.

142. *Id.* at ¶ 148, n.32 (explaining that the "Respondent cited to the Tribunal both the *Corfu Channel Case* (UK v.
Albania) (Merits), [1949] ICJ Reports 4, RLA-15 and the *Rainbow Warrior Case* (New Zealand v. France),
Award, 30 Apr. 1990, 20 RIAA 215, RLA-42.").

other words, notwithstanding the persuasiveness of the ICJ decisions, the Arbitral Tribunal was enquiring into further developments of the investment treaty arbitration case law.

Arbitral tribunals have cursorily relied on WTO case law for interpreting investment treaty and NAFTA Chapter 11 provisions. For instance, in *ADF v. United States of America*,[143] the Arbitral Tribunal referred to the *Shrimp Turtle* case and *Hormones* AB reports when applying customary rules of treaty interpretation.[144] In his Separate Opinion in the *Thunderbird* case,[145] Thomas Wälde made the argument that "gambling services, in particular if not typically accompanied by criminal by-products, have to be treated as a fully legitimate investment," relying *inter alia* on WTO panel and Appellate Body cases.[146]

The case for drawing from these different bodies of law is evident. On the one hand, authors have noted that "international courts essentially do share the same functions" by settling international disputes in accordance with law, and ensuring the proper administration of justice.[147] On the other hand, certain international treaties present an articulated regime that the investment treaties presuppose.[148] For instance, with regard to intellectual property, investment treaties restate or enhance the intellectual property guarantees provided in the WTO Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement).[149] When arbitrators have to interpret *TRIPs-plus* standards, they must first refer to the TRIPs standards. Other authors support such an approach, as it would impede the dilution of multilateral norms while providing predictability.[150] As Hsu points out, such borrowing offers direction in substantive interpretation of treaty language as

143. ADF Group Inc. v. U.S., ICSID Case No. ARB/AF/00/1, Award, (Jan. 9, 2003), *available at* http://ita.law.uvic.ca/documents/ADF-award_000.pdf.

144. *Id.* at ¶ 147 (citing Appellate Body report, *United States- Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 114, WT/DS58/AB/R (Oct. 12, 1998); Appellate Body Report, *EC-Measures Concerning Meat and Meat Products (Hormones)*, ¶¶ 165, 181, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

145. Int'l Thunderbird Gaming Corp. v. United Mexican States, 255 Fed. Appx. 531 (2007) (separate opinion of arbitrator Thomas Wälde, *available at* http://www.naftaclaims.com/Disputes/Mexico/Thunderbird/Thunderbird_Dissent.pdf).

146. *Id.* at ¶ 18 (citing to "the WTO Appeals Body decision in Antigua/Barbuda v US case of 7 Apr. 2005 ;
WT/DS285/AB/R [which] follow[s] on the earlier panel decision.").

147. Chester Brown, *The Use of Precedents of Other International Courts and Tribunals in Investment Treaty Arbitration*, 5(3) TRANSNAT'L DISP. MGMT. 1, 2 (2008).

148. Christina Pfaff, *Alternative Approaches to Foreign Investment Protection*, 3(5) TRANSNAT'L DISP. MGMT. 1, 15 (2006).

149. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments- Results of the Uruguay Round, 33 I.L.M. 1994. For commentary, see the following texts: DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS (2d ed. 2003); CARLOS M. CORREA, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A COMMENTARY ON THE TRIPS AGREEMENT (2007).

150. Locknie Hsu, *Applicability of WTO Law in Regional Trade Agreements: Identifying the Links*, *in* REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 449 (Lorand Bartels & Federico Ortino eds., 2006).

arbitral panels would be "able to draw upon the expertise of WTO dispute panels and the Appellate Body in the development of legal concepts and principles" albeit maintaining the possibility to contract away such jurisprudence by setting their own interpretation.[151]

In parallel, arbitral tribunals have made reference to and relied on human rights jurisprudence, to varying degrees, to determine the content of investment law.[152] For instance, in *Lauder v. Czech Republic*, the UNCITRAL Tribunal made reference to the European Court of Human Rights (ECtHR) case *Mellacher v. Austria* to derive the distinction between a *formal* and a *de facto* expropriation.[153] The *Tecmed* Tribunal made reference to an Inter-American Court of Human Rights case, *Ivcher Bronstein v. Peru*, to determine the content of indirect expropriation.[154] In *Saipem S.p.A v. Bangladesh*, the Tribunal cited several cases from the ECtHR for affirming that arbitral awards confer on parties a right to the sums awarded.[155] In the *Biloune* case,[156] the investor argued that the government of Ghana had breached both the investment treaty and human rights obligations, and in the *Euro-Tunnel* case the claimant argued that the obligations of the United Kingdom and France should be read in conjunction with the European Convention on Human Rights and its First Protocol.[157] Also *amicus curiae* may recall non-investment provisions in their briefs.[158] Finally, human rights obligations have also

151. *Id.* at 551-52.

152. Fry, *supra* note 94, at 83.

153. Lauder v. Czech Rep., Final Award, ¶ 200 (Sept. 3, 2001), 9 ICSID Rep. 66 (2001) (quoting Mellacher v. Austria, 169 Eur. Ct. H.R. (ser. A) (1989)), *available at* http://ita.law.uvic.ca/documents/LauderAward.pdf.

154. Técnicas Medioambientales S.A. v. United Mexican States, ICSID Case No. ARB/(AF)/00/2, Award, ¶ 116, n.36 (May 29, 2003) 43 I.L.M. 133 (2004) (quoting Baruch Ivcher Bronstein v. Peru, 2001 Inter-Am. Ct. H.R. (ser. C) No. 74, at ¶¶ 120-24 (Feb. 6, 2001)), *available at* http://ita.law.uvic.ca/documents/Tecnicas_001.pdf [hereinafter Tecmed].

155. Saipem S.p.A. v. People's Republic of Bangl., ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 130 (Mar. 21, 2007), *available at* http://ita.law.uvic.ca/documents/Saipem-Bangladesh-Jurisdiction.pdf (citing Stran Greek Refineries and Stratis Andreadis v. Greece, App. No. 13427/87, Eur. Ct. H.R, ¶¶ 59-62 (1994), *available at* http://worldlii.org/eu/cases/ECHR/1994/48.html and Brumarescu v. Rom., App. No. 28342/95, Eur. Ct. H.R., 10 Hum. Rts. Case Dig. 237-41 (1999), *available at* http://worldlii.org/eu/cases/ECHR/1999/105.html.

156. Biloune & Marine Drive Complex Ltd. v. Ghana Invs. Ctr. & Gov't of Ghana, Award on Jurisdiction and Liability, UNCITRAL, (Oct. 27, 1989), 95 ILR 183..

157. Moshe Hirsch, *Conflicting Obligations in International Investment Law: Investment Tribunals' Perspective*, *in* THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY-ESSAYS IN HONOUR OF PROFESSOR RUTH LAPIDOTH 323, 324-25 (Tomer Broude & Yuval Shany eds., 2008). In particular, in the *Euro-Tunnel Case*, the two claimants complained, *inter alia*, about the repeated delays and costs related to the intrusions in their French terminal of illegal immigrants intending to enter in the United Kingdom. Further they complained that the use of the Tunnel by illegal immigrants has led the United Kingdom to impose civil penalties on the concessionaries. Channel Tunnel Group Ltd. & France Manche S.A. v. Gov'ts of U.K. & Fr., Partial Award on Jurisdiction, ¶¶ 107, 110 (Jan. 30, 2007), *available* at http://www.pca-cpa.org/upload/files/ET_PAen.pdf.

158. Hirsch, *supra* note 157, at 325; *see, e.g.*, Glamis Gold Ltd. v. U.S., NAFTA, Non-Party Supplemental Submission: Submission of the Quechan Indian Nation (Oct. 16, 2006), *available at*

been invoked in the determination of remedies phase.[159] Other cases have made indirect reference to human rights cases. For instance, *Azurix Corp. v. Argentine Republic* indirectly cited human rights jurisprudence by relying on the relevant portions of the *Tecmed* decision.[160] Similarly, the *EnCana* Tribunal cited a domestic arbitration case that quoted a human rights case.[161] While some commentators have highlighted the "reluctance of tribunals to openly and systematically consider the public interest,"[162] others have stressed that arbitral tribunals increasingly rely on human rights cases "in their decisions, not merely in their *obiter dicta*."[163]

However, arbitral tribunals have generally adopted a cautious approach to the issue.[164] While the *TECMED* Tribunal relied on the proportionality test which has been formulated by the ECtHR,[165] the Arbitral Tribunal in *Biloune* held that its jurisdiction was limited to disputes in respect of the foreign investment and that it lacked "jurisdiction to address, as an independent cause of action, a claim of violation of human rights."[166] Arbitral tribunals are forums of limited jurisdiction, empowered to hear claims on treaty violations. Similarly, the *Siemens* Tribunal rejected the application of the margin of appreciation doctrine in investment arbitration, holding that "Article I of the First Protocol to the European Convention on Human Rights permits a margin of appreciation not found in customary international law or the Treaty."[167] In the *Euro-tunnel* case, the Tribunal defined its jurisdiction as arising only from the Canterbury Treaty and the related concessionary contract.[168] Therefore, the Tribunal deemed that its jurisdiction was

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http://www.state.gov/documents/organization/75016.pdf.

159. *See, e.g.*, Compañìa del Desarollo de Santa Elena v. Republic of Costa Rica, ICSID Case No. ARB/96/1, Final Award, ¶¶ 64-68 (Feb. 17, 2000), *available at* http://ita.law.uvic.ca/documents/santaelena_award.pdf.

160. Azurix Corp. v. Arg. Republic, ICSID Case No. ARB/01/12, Award, ¶¶ 311-12 (June 23, 2006), *available at* http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf.

161. EnCana v. Ecuador, London Ct. Int'l Arb., Award, ¶ 176, n.124 (Feb. 3, 2006), *available at* http://ita.law.uvic.ca/documents/EncanaAwardEnglish.pdf.

162. Charles H. Brower II, *Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 347, 347 (2008-09).

163. Fry, *supra* note 94, at 81, n.15 (noting that "[a]rbitral tribunals are not throwing in references to human rights cases merely for the sake of appearances.").

164. Hirsch, *supra* note 157 at 324, 331.

165. Técnicas Medioambientales S.A. v. United Mexican States, ICSID Case No. ARB/(AF)/00/2, Award, ¶ 122 (May 29, 2003) 43 I.L.M. 133 (2004), *available at* http://ita.law.uvic.ca/documents/Tecnicas_001.pdf. The arbitral tribunal made extensive reference to the *dicta* of other international courts and tribunals, including the International Court of Justice, the Inter-American Court of Human Rights, the European Court of Human Rights and the Iran-United States Claims Tribunal. *Id.* at ¶¶ 116, 120.

166. For commentary see Hirsch, *supra* note 157, at 329. Biloune & Marine Drive Complex Ltd. v. Ghana Invs. Ctr. & Gov't of Ghana, Award on Jurisdiction and Liability, UNCITRAL, (Oct. 27, 1989), 95 ILR 183, 203; Biloune Case Summary, *supra* note 156.

167. Siemens A.G. v. Arg. Republic, ICSID No. ARB/02/08, Award, ¶ 354 (Feb. 6, 2007), *available at* http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf.

168. Channel Tunnel Group Ltd. & France Manche S.A. v. Gov'ts of U.K. & Fr., Partial Award on Jurisdiction, ¶¶ 124, 135, 152 (Jan. 30, 2007), *available* at http://www.pca-cpa.org/upload

limited only to claims concerning the alleged violation of the concession contract and/or the Treaty. Accordingly, any violation of other international rules of the European Convention on Human Rights or EC law was beyond jurisdiction. However, the Arbitral Tribunal did not exclude the possibility that violations of the Treaty and the contract could be examined in light of rules of general public international law. As some authors have pointed out, "[i]n other words, even if the direct violation of such rules was beyond its jurisdiction, the evaluation of a violation of the concession contract *in comparison* with these provisions was not excluded."[169]

International judicial borrowing, that is, borrowing decisions from other international fora in the interpretation of international law, would be compatible with the unity of public international law and would promote its coherence. Judicial dialogue is feasible and possible: informal linkages already exist. Some arbitrators have been professors of public international law or judges in other international fora.[170] More substantially, other subsystems of public international law may provide interpretative guidance to arbitral tribunals.

However, on a cautionary note, it is important to highlight that distinctions exist between the different legal sub-systems. Textual differences need to be taken into account, as interpretation cannot be used to transpose obligations from one field to another, or to create new obligations. For instance, in *Victor Pey Casado v. Chile*, the Arbitral Tribunal made reference to the ICJ *LaGrand* judgment, which found that the provisional measures under Article 41 of the ICJ statute were binding.[171] However, Article 47 of the ICSID Convention contains different wording, as it states that arbitral tribunals shall have the power to "recommend" and not to "indicate" provisional measures.[172] While one may agree that such an

/files/ET_PAen.pdf (referencing the jurisprudence of the ICJ, the Permanent Court of International Justice and the International Tribunal for the Law of the Sea Award, at ¶ 135, ¶124, and ¶ 152 respectively).

169. Mathias Audit, *The Channel Tunnel Group Ltd and France-Manche SA v. United Kingdom and France*, 57 INT'L & COMP. L.Q. 724, 728 (2008) (emphasis added).

170. For instance, arbitrators may have served as former Presidents or judges of the ICJ (Bedjaoui, Guillaume, Higgins, Schwebel), former members of the WTO AB (Feliciano, Bacchus), former Judges of the Inter-American Court of Human Rights (Nikken, Cançado Trindade), former President of the UN Security Council (Fortier); or may be academics (Berman, Bernini, Böckstiegel, Brower, Crawford, Dupuy, Giardina, Kauffmann-Kohler, Higgins, Lowe, Stern, Weiler). *See, e.g.*, International Council for Commercial Arbitration (ICCA), ICCA Officers & Members, http://www.arbitration-icca.org/officers-and-members.html#/officers-and-members/MEMBERS.html (last visited Sept. 9, 2010); Law.com, Arbitration Scorecard 2007: Top 50 Treaty Disputes, The American Lawyer, June 13, 2007, http://www.law.com/jsp/article.jsp?id=1181639136817 (listing the top 50 2007 arbitration disputes with many of the aforementioned judges and scholars named as the arbitrators).

171. Victor Pey Casado & President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Decision on Provisional Measures, ¶ 17 (Sept. 25, 2001), 16 ICSID Rep. 603 (2001), *available at* http://ita.law.uvic.ca/documents/Victor-French.pdf (French version, only available in Spanish or French).

172. *See* Brown, *supra* note 147, at 4 (criticizing this approach as inappropriate use of precedent, subsequently followed by the arbitral tribunal in *Tokio Tokeles v. Ukraine* (Tokio Tokeles v. Ukr., ICSID ARB/02/18, Procedural Order No. 1, ¶ 4 (Jul. 1, 2003), 20 ICSID Rep. 205 (2005), *available at* http://ita.law.uvic.ca/documents/tokios-order1.pdf)).

interpretation favors the effectiveness of the ICSID Convention, and can be justified by the inherent powers of international courts to grant provisional measures, without a doubt such line of reasoning involves the expansion of the treaty terms beyond the purpose of the treaty makers,[173] clearly contributing to the development and evolution of law, but determining margins of uncertainty. In other cases, arbitral tribunals have followed the literal treaty terms vis-à-vis other jurisdictional trends. For instance, in the *Methanex* case, when the claimant sought to show that it was a producer "in like circumstances" as US domestic producers by arguing that Methanex produced "like products" and relying on related WTO jurisprudence, the Tribunal declined to rely on such jurisprudence, because NAFTA Chapter 11 did not contain the term of art "like product" which is relevant in the interpretation of GATT Article III.[174] In addition, investment law does not incorporate a necessity standard in its disciplines, and in cases of breach its remedies include compensation, not cessation.

The problem with judicial borrowing is that it is a very powerful instrument which needs to be handled properly. The major risk consists of adopting an ideology of free decision making[175] and creating anarchy. In the case selection there may be a certain bias, as relying on human rights case law rather than WTO jurisprudence makes a difference in the context of a specific case.[176] Some have pointed out that "the dissimilar architecture of treaties, including objectives, obligations, defenses, and remedies, advises against attempts of outright transposition of rules, methodologies, or solutions. . . ."[177]

C. Reference to the Jurisprudence of National Courts

As consideration of other legal regimes is conceptually possible in investment treaty arbitration, some arbitral tribunals expressly refer to national cases.[178] Is national case law applicable to foreign investment-related disputes? To answer this question, a distinction needs to be made. If the applicable law is that of the host

173. CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 758 (2001) (Professor Schreuer underlined that the "Convention's legislative history shows clearly that a conscious decision was made *not* to grant the Tribunal the power to order binding provisional measures." (emphasis added)).

174. Methanex Corp. v. U.S., NAFTA, Final Award, Part IV, ch. B, ¶¶ 23-35 (Jan. 15, 2001), *available at* http://www.state.gov/documents/organization/51052.pdf.

175. *See, e.g.,* RAIMO SILTALA, A THEORY OF PRECEDENT- FROM ANALYTICAL POSITIVISM TO A POST-ANALYTICAL PHILOSOPHY OF LAW 4 (2000) (analyzing free judicial decision making); *see also* RICCARDO GUASTINI, LE FONTI DEL DIRITTO E L'INTERPRETAZIONE (1993) (examining the sources of law and their interpretation under a judicial decision making context).

176. *See* Ran Hischl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125 (2005).

177. Marcos A. Orellana, *Science, Risk and Uncertainty: Public Health Measures and Investment Disciplines*, *in* NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 671, 788 (Philippe Kahn & Thomas W. Wälde eds., 2007).

178. *See, e.g.*, Grand River Enterprises Six Nations, Ltd., et al. v. U.S., Decision on Objections to Jurisdiction, ¶ 77, n.34 (July 20, 2006), *available at* http://www.state.gov/documents/organization/69499.pdf (referencing U.S national cases, U.S. v. Nancy, 189 F.3d 954 (9th Cir. 1999) and Christoph v. U.S., 931 F. Supp. 1564 (S.D. GA. 1996), to validate the concept that "a person may "incur" expenses before he or she actually dispense any fund.").

state, reference to its jurisprudence in order to clarify relevant provisions may be made *ipso jure*.[179] Questions arise with regard to reference to jurisprudence of other national courts.[180] Adopting a functionalist approach, some emphasize that that the issue of regulatory expropriation, and other similar issues identified in investor-state dispute settlement, initially emerged as "constitutional issue[s] in national law."[181] According to Wälde and Kolo, the debate on regulatory taking in the jurisprudence of the US Supreme Court presents a constitutional character that would make it "particularly apposite to serve as a laboratory — but also as relative precedent — for the interpretative challenges" in international dispute settlement.[182] The functionalist approach is based on the *praesumptio similitudinis*,[183] and holds that "[c]omparative constitutional law seems to provide the most suitable analogy and precedent" to investor-state arbitration.[184]

However, such a functionalist approach reduces the law to a formal technique of conflict resolution denying its political underpinnings. The functionalists deprive legal provisions of their systemic context and "integrat[e] them in an artificial universal typology of 'solutions.'"[185] Nonetheless, one of the main features of investment arbitration is its detachment or separation from national courts and their potential biases. From an international law perspective, investment treaties do not amount to "constitutional charters"; rather, they institutionalize a limited set of obligations to which sovereign states have voluntarily consented.[186] Also, it may be practically impossible to take the wide variety of national jurisprudence into account. Ideally, an arbitral tribunal should make a thorough survey of comparative law, making use of the scholarly work that has been done on the issue in order to devise the most efficient legal system. But this does not happen in practice. Usually only the laws of a small number of countries are cited.[187] Therefore, it may be difficult to eliminate cultural biases and possible hegemonic thinking. For example, some authors have criticized reference to the

179. *See* A.F.M. Maniruzzaman, *State Contracts in Contemporary International Law: Monist Versus Dualist Controversies*, 12 EUR. J. INT'L L. 309, 320 (2001).

180. For a seminal study on the importance of comparative law in international law and arbitration, see HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION (1927).

181. Wälde & Kolo, *supra* note 90, at 821.

182. *Id.* at 847.

183. Konrad Zweigert, *Die "Praesumptio Similitudinis" als Grundsatzvermutung rechtsvergleichender Method*, *in* BUTS ET METHODS DU DROIT COMPARE/AIMS AND METHODS OF COMPARATIVE LAW 735 (M. Rotondi ed., 1973) (examining the "practice of similitude" as a fundamental assumption of comparative law).

184. Wälde & Kolo, *supra* note 90, at 822.

185. Frankenberg, *supra* note 63, at 411.

186. Gus V. Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 130 (2006).

187. *See* Nedim Peter Vogt, *The International Practice of Law and the Anglo-Internationalization of Law and Language*, *in* FESTSCHRIFT LIBER AMICORUM TUGRUL ANSAY 455, 459 (Sabih Arkan & Aynur Yongalik eds., 2006) (scrutinizing "advent of English as the Language of Law within the context of the Anglo-Internationalization of the practice of law . . . ."); *see also* Frankenberg, *supra* note 185, 442 ("Despite all these claims that the comparatist be open-minded and think supra-nationally, the civil and common law still rule over the comparatists' world.").

US jurisprudence because this would be tantamount to rewriting other countries' constitutional culture and experience.[188] Somehow, drawing on the particular constitutional experience of a country would re-politicize investment disputes, against more neutral international canons.[189] Finally, one may question whether this might amount to extraterritorial application of law.

In conclusion, as an eminent comparative law scholar pointed out, "[t]he conscious and limited use of national legal traditions is advantageous in that it enriches international law with useful source materials, analogies and techniques."[190] However, "preconceptions" are dangerous, and every case would deserve *ad hoc* consideration. More than a century ago, Oppenheim warned that "the science of international law must be careful in the appreciation of such municipal case-law."[191] If the applicable law is the law of the host state, of course reference may be made to the administrative law and jurisprudence of the host state. Where the applicable law is international law, reference to national cases becomes a more sensitive issue which the arbitrators must decide. In any case, if national precedents as well as international ones may be taken into account for the persuasiveness of their *ratio decidendi*, they are not binding on international arbitrators.

VI. CONCLUSION

This paper has focused on the use of the comparative method in international investment arbitration. Comparison is a mode of thinking and is consistently used in both literary and legal sources. While poets have the amplest freedom to compare extremely different elements,[192] lawyers need to follow strict rules. In legal systems and investment arbitrations comparisons are consistently being made; the phenomenon is far from new. Why then does it need to be scrutinized? There are two main reasons for doing so. First, it seems that while comparisons are made, they are often done without full awareness of their implications from a systemic perspective. Second, although investment treaty arbitration has become the most common method for settling investor-state disputes, some authors have nonetheless harshly criticized it because of its alleged lack of human rights

188. *E.g.*, David Schneiderman, *NAFTA's Takings Rule: American Constitutionalism Comes to Canada* 46 U. TORONTO L.J. 499 (1996); David Schneiderman, *Constitution or Model Treaty? Struggling over the Interpretative Authority of NAFTA*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 294 (Sujit Choudhry ed., 2006).

189. Kennedy, *supra* note 1, at 606-08.

190. LINDELL V. PROTT, THE LATENT POWER OF CULTURE AND THE INTERNATIONAL JUDGE 230 (1979).

191. Lassa Oppenheim, *The Science of International Law: Its Tasks and Methods*, 2 AM. J. INT'L L. 313, 336 (1908); *Id.* at 338 (The author added: "I do not deny . . . that the intrinsic value of many such decisions and the convincing arguments which accompany them had their bearing upon courts of other countries and thereby in fact made these cases precedents which are followed by the courts of all or many other countries, but in law and *per se* they are and remain precedents for the judges of their own country only.").

192. For instance, Shakespeare famously compared the beloved friend to a summer day. WILLIAM SHAKESPEARE, SONNETS, SONNET XVIII.

consideration. This paper has questioned whether the mechanism may actually benefit from a wider use of comparative law.

Like any other kind of adjudication, consistent patterns, attitudes, values and opinions characterize investment treaty arbitration. All these elements form what may be called a *legal culture*.[193] The culture of investment treaty arbitration constitutes a sort of melting pot of different legal traditions as it presents mixed characteristics of common law and civil law traditions. While previous studies have focused on the procedural dimension of the phenomenon, this article has focused on its substantive dimension. While other studies have compared the different legal frameworks which regulate foreign investments at the national level, this study has focused on the role of the comparative method in international investment law and arbitration.

After scrutinizing arbitrators' use of comparative law in investment treaty disputes, this paper critically assessed this approach. Arbitrators may use analogies and judicial borrowing; this is part of legal reasoning and it is legitimate to do so, in light of customary rules of treaty interpretation. According to these rules, contextual interpretation is a legitimate tool of interpretation. Furthermore, arbitrators may detect international principles of law through the analysis of relevant jurisprudence of other courts and tribunals. However, they need to pay attention to methodology issues. Judicial borrowing cannot be an uncritical exercise. As many comparative lawyers well know, legal norms express a certain political position,[194] being the outcome of certain historical evolution.[195] The case selection and the selection of the *tertium comparationis* may affect the outcome of the case.

This study highlights the fact that reference to national case law may be problematic in consideration of extraterritorial character of such application and of the risk of re-politicizing investment treaty disputes. National case law becomes relevant where the applicable law is the *lex loci*. By contrast, reliance on persuasive precedents of previous arbitral tribunals may lead to the coalescence of different legal traditions and experiences and to an increased coherence of the system.[196] As Lauterpacht pointed out, "[i]nternational arbitral law has produced a body of precedent which is full of instruction and authority. Numerous arbitral awards have made a distinct contribution to international law by reason of their scope, their elaboration, and the conscientiousness with which they have examined the issue before them."[197]

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193. *See, e.g.*, LAWRENCE FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 15 (1975); Roger Cotterell, *The Concept of Legal Culture*, *in* COMPARING LEGAL CULTURES 13-14 (David Nelken ed., 1997).

194. RENÉ RODIÈRE, INTRODUCTION AU DROIT COMPARÉ 4 (1979) (explaining that "les règles de droit n'intéressent pas le comparatiste dans leur expression normative, mais tant qu'elles manifestent une certain position politique" or as translated from French, "the comparatist is not interested in the rules of law in their normative expression, but as they manifest a certain political position.").

195. *Id.*

196. McLachlan, *supra* note 115.

197. Paulsson, *supra* note 83, at 97 (citing HERSCH LAUTERPACHT, THE DEVELOPMENT OF

In parallel, the increasing reliance on cases of other international courts and tribunals may increase the perceived legitimacy of the system especially in cases in which constitutional dilemmas are at stake. This comparative mood of arbitral panels should not be read as arbitral activism or as articulation of *free law* doctrine, but as an interpretative tool allowed for in customary rules of treaty interpretation.[198] Furthermore, insofar as certain legal principles have become norms of customary law they may be applied to the disputes as applicable law. In conclusion, given the attitude of arbitral tribunals to borrow from the experience of other courts and tribunals and the comparative trend of scholarly analysis, a more conscious use of the comparative method needs to be promoted. Comparisons are not a neutral or objective phenomenon: "[T]he comparativist has to regard herself as being involved: involved in an ongoing social practice constituted and pervaded by law; involved in a given legal tradition . . .; and involved in a specific mode of thinking and talking about law."[199] Once aware of perspective, arbitral tribunals and interpreters can make conscious use of the instruments of law. Not only would such awareness limit eventual abuses of the comparative method, but it would also favor the coherence of the international legal system. While investment law is closely associated with what arbitrators say it is, the two are distinct: "[P]rior cases provide evidence of the law, but they cannot be conclusive."[200]

INTERNATIONAL LAW BY THE INTERNATIONAL COURT 17-18 (1958).

198. Campbell McLachlan, *Investment Treaties and General International Law*, 57 INT'L & COMP. L.Q. 361 (2008).

199. Frankenberg, *supra* note 63, at 443.

200. Peter Wesley-Smith, *Theories of Adjudication and the Status of Stare Decisis*, *in* PRECEDENT IN LAW 73, 80 (Laurence Goldstein ed., 1987).

DRONE WARFARE AND THE LAW OF ARMED CONFLICT

RYAN J. VOGEL*

"[I]n all of our operations involving the use of force, including those in the armed conflict with al Qaeda, the Taliban, and associated forces, the Obama Administration is committed by word and deed to conducting ourselves in accordance with all applicable law.... [I]t is the considered view of this Administration... that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war."

Harold Koh, U.S. State Department Legal Adviser[1]

"My concern is that these drones, these Predators, are being operated in a framework which may well violate international humanitarian law and international human rights law."

– Philip Alston, United Nations Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions[2]

The United States has increasingly relied upon unmanned aerial vehicles (UAVs), or "drones," to target and kill enemies in its current armed conflicts. Drone strikes have proven to be spectacularly successful—both in terms of finding and killing targeted enemies and in avoiding most of the challenges and controversies that accompany using traditional forces. However, critics have begun to challenge on a number of grounds the legality and morality of using drones to kill belligerents in the non-traditional conflicts in which the United States continues to fight. As drones become a growing fixture in the application of modern military force, it bears examining whether their use for lethal targeting

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1. Harold Koh, Legal Advisor, U.S. Dep't of State, Keynote Address at the American Society for International Law Annual Meeting: The Obama Administration and International Law (March 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm.

2. *US Warned on Deadly Drone Attacks*, BBC NEWS (Oct. 28, 2009), http://news.bbc.co.uk/2/hi/8329412.stm.

operations violates the letter or spirit of the law of armed conflict. In this article I identify the legal framework and sources of law applicable to the current conflicts in which drones are employed; examine whether, and if so in what circumstances, using drones for targeting operations violates the jus in bello principles of proportionality, military necessity, distinction, and humanity; and determine what legal boundaries or limitations apply to the seemingly limitless capabilities of drone warfare. I then evaluate whether the law of armed conflict is adequate for dealing with the use of drones to target belligerents and terrorists in this non-traditional armed conflict and ascertain whether new rules or laws are needed to govern their use. I conclude by proposing legal and policy guidelines for the lawful use of drones in armed conflict.

In an effort to reach remote territory and targets, save American blood and treasure, achieve optimal accuracy and efficiency in targeting operations, and perhaps to avoid the controversies[3] surrounding the insertion of ground forces, the United States has increasingly relied upon unmanned aerial vehicles (UAVs), or "drones,"[4] to target and kill enemies in its current armed conflicts.[5] The United States has utilized drones to support combat and counterterrorism efforts across its theaters of armed conflict.[6] Drone targeting has proven to be spectacularly successful—both in terms of finding and killing targeted enemies and in avoiding most of the challenges and controversies that accompany using traditional forces. However, critics have begun to challenge on a number of grounds the legality and morality of using drones to kill belligerents in the non-traditional conflicts in

3. In particular, relying on drones to remotely attack targets avoids the thorniest byproduct of inserting ground forces in America's current conflicts: detention of enemy belligerents and security threats.

4. In this paper I use the terms "drone" and "UAV" interchangeably. Recently, some have begun to use the term "remotely-piloted aircraft," or "RPA," to describe UAVs, likely in an effort to emphasize the human element of control with UAVs. However, while the RPA may be a more accurate term, I use the terms UAV and drone in this paper for purposes of consistency and audience familiarity.

5. As explained by U.S. State Department Legal Adviser, Harold Koh, and mirroring the posture taken by the U.S. Government in the Guantanamo habeas litigation and in its first universal periodic review submission to the Human Rights Council, the Obama Administration considers the United States to be "engaged in several armed conflicts": one in Iraq, one in Afghanistan, and importantly to this discussion, another against al Qaeda, the Taliban, and associated forces both "in Afghanistan and elsewhere." While the Obama Administration publicly purged the term "global war on terror" from its official lexicon, and wisely so, since the U.S. Government likely never intended to fight *any* form of terrorism *anywhere* in the world, Harold Koh's expression of the Administration's position amounts to a *global war against specific terrorists* – namely, al Qaeda, Taliban, and associated forces, including those who substantially support or harbor them. This is no mere insignificant rhetorical modification: the Obama Administration has expressly taken the previous administration's posture of fighting the parties contemplated by the AUMF in a wartime framework anywhere in the world and applying the law of armed conflict to any individuals they encounter in that fight, subject of course to "considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses." *See* Koh, *supra* note 1. *See also* Curtis A. Bradley and Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005).

6. *See, e.g.*, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, ¶¶ 7, 18-22, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Phillip Alston).

which the United States continues to fight.[7] After much anticipation and speculation in the international law community, and after promptings by the UN and other organizations for the United States to deliver a legal justification for its drone strikes, U.S. State Department Legal Adviser Harold Koh addressed the American Society for International Law's (ASIL) 2010 Annual Meeting and used the occasion to present the "considered view" of the Obama Administration in regards to U.S. targeting operations, particularly those conducted with drones.[8] Koh explained that "great care is taken to adhere to [the principles of distinction and proportionality]... in both planning and execution" of lethal targeting operations, and asserted that such operations "comply with all applicable law, including the laws of war."[9] As drones become a growing fixture in the application of modern military force, it bears examining whether their use for lethal targeting operations violates the letter or spirit of the law of armed conflict.[10]

In this article, I identify the legal framework and sources of law applicable to the current conflicts in which drones are employed;[11] examine whether, and in what circumstances, using drones for targeting operations violates the *jus in bello* principles of proportionality, military necessity, distinction, and humanity; and determine what legal boundaries or limitations apply to the seemingly limitless capabilities of drone warfare. I then evaluate whether the law of armed conflict is adequate for dealing with the use of drones to target belligerents and terrorists in this non-traditional armed conflict and ascertain whether new rules or laws are needed to govern their use. I conclude that the law of armed conflict adequately governs drone warfare and provides guiding principles for conducting drone strikes within the letter and spirit of the law.

I. INTRODUCTION

A. Background

The use of unmanned drones to target belligerents presents complex legal issues for modern warfare. However, the appearance of new and advanced weapons in warfare is hardly a new challenge in the history of armed conflict. Technological progress has produced increasingly sophisticated means for fighting, while laws to moderate or police their use have typically lagged far behind. At different times in history, developments such as the crossbow, gunpowder, machine guns, tanks, airplanes, noxious gasses, nuclear bombs, and a number of other deadly inventions, irreversibly changed the landscape of warfare and required groups and states to reassess the laws governing armed conflict. The United Nations' call, then, for the United States to justify the legality of its drone

7. *Id.* at ¶¶ 18-22.

8. Koh, *supra* note 1.

9. Koh, *supra* note 1.

10. While experts have recognized substantive distinctions in the names used to describe the rules governing armed conflicts, I prefer the term "law of armed conflict" and use it interchangeably with the "law of war" and "international humanitarian law" in this article.

11. While I draw on U.S. law to help characterize the conflict, this article aims to examine the issue of drone warfare through the lens of the *international* law of armed conflict. U.S. domestic law applicable to the issue at hand is not the focus of this article.

strike program[12] should not come as a surprise. Public officials, experts, practitioners, operators, and lawyers are just now coming to grapple with the rules and legal framework for the emerging use of drones in order to determine guidelines for the use of this new technology.[13]

Some of this concern is understandable, as drones seem to have moved overnight to the front line of America's current armed conflicts. In reality, UAVs languished for years in development and obscurity[14] before becoming, as CIA Director Leon Panetta famously put it, "the only game in town."[15] Even in the early years of the current wars in Afghanistan and Iraq, the U.S. military rarely utilized the emerging technology. In 2001, the Predator UAV fleet numbered only ten and was typically relegated to reconnaissance missions, when used at all.[16] By 2007, Predators numbered more than 180, with plans to nearly double that number over the next few years.[17] In addition to the Predator drone (about 27 feet long and capable of flying for 24 hours at up to 26,000 feet), the best known of the American UAV fleet, the United States has increasingly employed a number of other drones in the current conflicts, including the Global Hawk (the largest of the fleet at 40 feet long and capable of flying for 35 hours and up to 65,000 feet), the Shadow (only 12 feet long and capable of flying for 5 hours or 70 miles), the Hunter (around 24 feet long and capable of flying twice as long as the Shadow), the Raven (just 38 inches long and only 4 pounds, capable of flying for 90 minutes at about 400 feet), and the Wasp (even smaller than the Raven).[18] The smaller drones of the UAV fleet are used primarily for reconnaissance and target acquisition, while the larger drones are armed with Hellfire missiles and used to conduct strikes, in addition to higher altitude reconnaissance.[19] A number of other UAVs are expected to be operated in the near future to update and expand capabilities, including the Reaper, the Peregrine, and the Vulture.[20] The Pentagon

12. *US Warned on Deadly Drone Attacks*, *supra* note 2.

13. A recent story in the Harvard National Security Journal poignantly illustrated the need for such guidelines. Brett H. McGurk writes:

> There is yet another reason to define clear standards for the drone program: '*In warfare, what comes around – goes around.*' Tas Oelstrom emphasized that simple maxim during the symposium, a point driven home by MIT's Mary Cummings, who showed with alarming detail how easily drone technology is patterned and even piloted with an iPhone. 'Yes,' she said, 'there is an app for that.'

Brett H. McGurk, *Lawyers: A Predator Drone's Achilles Heel?*, HARVARD NAT'L SEC. J. (Mar. 11, 2010), http://www.harvardnsj.com/2010/03/lawyers-a-predator-drone's-achilles-heel/.

14. For a detailed history of the development and deployment of UAVs, *see generally* P.W. Singer, WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY (2009).

15. *U.S. Air Strikes in Pakistan Called 'Very Effective,'* CNN.COM (May 18, 2009, 6:48 PM), http://www.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes/.

16. P.W. Singer, *Military Robots and the Laws of War*, 23 THE NEW ATLANTIS 25, 37 (2009), *available at* http://www.thenewatlantis.com/publications/military-robots-and-the-laws-of-war.

17. *Id.*

18. *Id.* at 37-39.

19. *Id.* at 39.

20. *Id.*

has made producing and evolving all aspects of its drone fleet a top budgetary and strategic priority for the coming years.[21]

B. Framing the Issues

It seems clear that the United States intends to advance and expand its UAV program, including for lethal strike operations.[22] Reportedly, more drone strikes were carried out in President Barack Obama's first year in office than in the previous eight years combined under George W. Bush, and 2010 has almost doubled the pace of 2009.[23] Indeed, over the past two years, a number of senior Obama Administration officials have come out in defense of drone warfare.[24] However, while the U.S. Government has been clear about its intent to use drones for targeting operations, and while it has broadly defended its policy of conducting strikes against parties contemplated by the Authorization for the Use of Military Force (AUMF),[25] the government's public proponents have rarely delved into some of the weightier issues presented by drone warfare. A few hypotheticals may help illustrate the preeminent issues:

Hypothetical 1: A military operator in Afghanistan identifies a Taliban target within Afghanistan, determines through intelligence sources that the target is reachable at his home and that the operation would meet the proportionality, necessity, and humanity requirements under the law of armed conflict, and employs a drone to conduct the kill operation.

Hypothetical 2: A military operator on a ship off the Horn of Africa identifies a high-level al Qaeda target within Yemen, determines through intelligence sources that the target is reachable while at a funeral and that the operation would

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21. *See, e.g.*, U.S. DEP'T OF DEF., QUADRENNIAL DEFENSE REVIEW viii, 10-12, 18, 22, 101, 104, *available at* http://www.defense.gov/qdr/ (last visited Oct. 11, 2010); U.S. DEP'T OF DEF., QUADRENNIAL ROLES AND MISSIONS 24-29 (Jan. 2009), *available at* http://www.defense.gov/news/Jan2009/QRMFinalReport_v26Jan.pdf; *see generally* U.S. DEP'T OF DEF., FY 2009-2034 UNMANNED SYSTEMS INTEGRATED ROADMAP 1, *available at* http://www.jointrobotics.com/documents/library/UMS%20Integrated%20Roadmap%202009.pdf.

22. *Id.*

23. *Pakistan denies U.S. request to expand drone access, official says*, CNN.COM (Nov. 22, 2010, 11:04 AM), http://www.cnn.com/2010/WORLD/asiapcf/11/22/pakistan.us.drones/index.html.

24. *See, e.g.*, Koh, *supra* note 1; *U.S, Airstrikes in Pakistan Called 'Very Effective,' supra* note 15 (recounting CIA Director Leon Panetta's defense of drone strikes); *Future of Military Aviation Lies with Drones: US Admiral*, SPACE WAR (May 14, 2009), http://www.spacewar.com/reports/Future_of_military_aviation_lies_with_drones_US_admiral_999.html (quoting Chairman of the Joint Chiefs, Admiral Mullen, and Secretary of Defense, Robert Gates, on the future use of UAVs in the military).

25. In this article, I will use the term "AUMF" as an adjective to reference the parties with which the United States is at war under the 2001 Authorization for the Use of Military Force (Taliban, al Qaeda, and associated forces) and the conflict in which the United States is engaged (e.g., AUMF foes, AUMF enemies, AUMF parties, and AUMF conflict). Because both the Bush and the Obama administrations rely on the AUMF for authority to conduct hostilities against al Qaeda, the Taliban, and associated forces in Afghanistan and elsewhere, and because the label "global war on terrorism" has been (wisely) abandoned, the tag "AUMF" most succinctly and accurately describes the conflict and parties involved. *See* RICHARD F. GRIMMETT, CONGRESSIONAL RESEARCH SERV., RS 22357, AUTHORIZATION FOR THE USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS 3-4 (2007) [hereinafter AUMF].

meet the proportionality, necessity, and humanity requirements under the law of armed conflict, and employs a drone to conduct the kill operation.

Hypothetical 3: A CIA operator in Kabul identifies a group of Jaish-e-Muhammad fighters (known al Qaeda affiliates) in a Waziristan "safe house," determines through intelligence sources that the target is reachable and that the operation would meet the proportionality, necessity, and humanity requirements under the law of armed conflict, and employs a drone to conduct the kill operation.

Hypothetical 4: A CIA operator in Djibouti identifies al-Shabaab leaders (loosely aligned with al Qaeda) in Somalia, determines through intelligence sources that the targets are reachable at a meeting of associates and that the operation would meet the proportionality, necessity, and humanity requirements under the law of armed conflict, and employs a drone to conduct the kill operation.

A number of recurrent issues present themselves in these examples: (1) *Consent of the government where the strike occurs.* Does it matter if the host government consents to the strike, expressly opposes the strike, or is silent on the matter? (2) *Rank or importance of the targeted individual.* Does a target need to have sufficient rank or importance to be targeted? Do certain targets, because of their seniority or importance, justify more latitude in regards to determining what constitutes "acceptable" collateral damage? (3) *Foreseeability of civilian losses.* Does it matter if the strike causes unforeseeable but disproportionate civilian losses? In a conflict where the enemy intentionally fails to distinguish himself, and indeed intentionally seeks to mask his combatant status as a matter of course, is there a requirement to subject intelligence assessments to heightened levels of scrutiny before targeting civilians who have lost their protected status by participating in the hostilities? (4) *Humanitarian objective.* Does the United States have an affirmative obligation to seek the less harmful option if a target might just as easily, or within a reasonable range of practicability, be captured and detained? (5) *Location of the strike.* Does the answer of legality differ if the strike takes place within the recognized battlefield of Afghanistan, the border region of Pakistan, the ungoverned spaces of Somalia, or the terrorist havens of Yemen? Will the answer change if the strike occurs on the high seas or in a "neutral" country or zone? (6) *Location of the operator.* Does it matter if the operator is located within the same zone of hostilities or somewhere outside it? What if the operator is located on a ship or in Nevada or Virginia? (7) *Status of the operator.* Does it matter if the operator conducting the strike is a civilian or combatant uniformed member of the armed forces? Where do CIA personnel fit into this status characterization? In the proceeding sections, I will address each of these questions and issues within the context of both current law governing armed conflict and the realities of a new kind of war.

II. LEGAL FRAMEWORK AND SOURCES OF LAW

A. Wartime or Criminal Legal Framework?

At the outset, it is important to identify the proper legal framework on which to base our analysis. It should be noted, however, that the application of one legal framework need not be exclusive to the application of another. In the war against al Qaeda and its terrorist associates, if the government reasonably concludes that it

is involved in an "armed conflict," the government may properly utilize law of war methods as well as criminal law enforcement methods for enforcement, detention, and prosecution of terrorists, depending on the circumstances. In fact, the U.S. Government has frequently used law enforcement personnel and resources, the criminal code, and civilian courts to thwart, identify, apprehend, and try terrorists before and since 9/11,[26] and the Justice Department has signaled its intent to continue to do so, including by trying some of the Guantanamo detainees in federal court.[27]

That said, the U.S. Government has made clear that it considers itself at war in Afghanistan, Iraq, and with the parties contemplated by the AUMF.[28] From Koh's formal explanation in his 2010 ASIL speech, to language in presidential and executive orders, court filings, human rights reports, and statements by senior officials in both the Bush and Obama Administrations, the Executive Branch has consistently characterized the current conflicts to be armed conflicts, governed primarily by the *lex specialis* of the laws of war.[29] Congress has also consistently, and without exception, confirmed the Executive's characterization of the current conflicts as armed conflicts.[30] In addition, as the courts have reviewed issues of detention and treatment of detainees, they have also dependably upheld the political branches' characterization of the current conflicts as armed conflicts, to which unique rules apply, from the Supreme Court's decisions in *Hamdi* and *Boumediene,* to the most recent habeas decisions in the D.C. Circuit and the D.C. District Court.[31] Thus, all three branches of government,[32] in both Republican and

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26. *See, e.g.*, JAMES J. BENJAMIN, JR. & RICHARD B. ZABEL, HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS, 2009 UPDATE AND RECENT DEVELOPMENTS 6 (2009) *available at* http://www.humanrightsfirst.org/pdf/090723-LS-in-pursuit-justice-09-update.pdf.

27. *See, e.g.*, *Attorney General Announces Forum Decisions for Guantanamo Detainees*, U.S. DEP'T OF JUSTICE (Nov. 13, 2009) *available at* http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html; *DOJ Says Some Terror Suspects to be Tried in Federal Court*, AM. CONSTITUTION SOC'Y BLOG (Nov. 13, 2009, 12:48 PM), *available at* http://www.acslaw.org/node/14808. While there has been controversy about trying terrorists in federal courts, in particular the 9/11 co-conspirators, the Attorney General has consistently supported using federal courts for trying detainees at Guantanamo and future captures.

28. *See, e.g.*, Koh, *supra* note 1; Exec. Order No. 13234, 66 Fed. Reg. 221 (Nov. 9, 2001); Exec. Order No. 13239, 66 Fed. Reg. 241 (Dec. 12, 2001); Military Order, 66 Fed. Reg. 222 (Nov. 13, 2001); Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, In re Guantanamo Bay Detainee Litigation, No. 08-442, 3 (D.C. March 13, 2009); President Barack Obama, Remarks by the President on National Security, National Archives (May 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09; Human Rights Council, U.S., *Nat'l Report Submitted in Accordance with Para. 15 (a) of the Annex to Human Rights Council Res. 5/1*, U.N. Doc. A/HRC/WG.6/9/USA/1 (Aug. 23, 2010) *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/155/69/PDF/G1015569.pdf?OpenElement.

29. *Id.*

30. *See, e.g.*, AUMF, *supra* note 25, at 3-4; Detainee Treatment Act of 2005, 28 U.S.C. § 2241(e)(2)); Military Commissions Act of 2006, 10 U.S.C. § 948(2)(a); *see generally*, National Defense Authorization Act of 2009, Pub. L. 111-84 (2009).

31. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 771 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 630–31 (2006); *Hamdi v. Rumsfeld*, 542 U. S. 507, 518-19 (2004); *see also*, *Gherebi v. Obama*, 609 F.

Democrat Administrations and Congresses, have consistently characterized the situations in Afghanistan, Iraq, and with Taliban, al Qaeda, and associated forces as that of an armed conflict governed by the laws of war.

As evidenced by Koh's ASIL speech, the United States couches its foundational legal authority to target AUMF belligerents within the self-defense terms of Article 51 from the UN Charter.[33] The U.S. Government takes the position that the events of September 11, 2001 constituted an "armed attack" by a transnational terrorist organization, thereby triggering application of the laws of armed conflict.[34] Congress emphasized this fact when, in response to the 9/11 attacks, it authorized the President to exercise the country's "rights to self-defense" and to "use all necessary and appropriate force" in order to prevent future acts of terrorism against the United States.[35] The Obama Administration, like its predecessor, continues to rely on that statutory authority to use military force against the parties described in the AUMF.

However, while the AUMF clearly provides the authority for the use of military force, it offers a great deal of ambiguity for its application. For example, the AUMF grants the president sweeping power to determine who falls within the enemy forces.[36] In a war against a shadowy and purposefully indistinct adversary, this power to define the enemy is significant, even if operationally necessary. Additionally, the AUMF does not impose geographical limitations of any kind.[37] While the law does not seem to contemplate a "global war on *terror*," it certainly provides for a global war against *specific terrorists* – namely, al Qaeda, Taliban, and associated forces, including those that substantially support or harbor them.[38]

Supp. 2d 43, 55 (DDC 2009).

32. The fact that all three branches agree on the characterization of the conflict places it squarely within Justice Jackson's category of maximum executive authority in his *Youngstown* concurrence. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-39 (1952) (Jackson, J. concurring).

33. *See* Koh, *supra* note 1; U.N. Charter art. 51.

34. AUMF, *supra* note 25, at 5 (referencing article 5 of the Washington Treaty). The UN and NATO also recognized that a state of armed conflict existed between the United States and the perpetrators of the 9/11 attacks in New York, Washington, D.C., and Pennsylvania. *See, e.g.,* Press Release, Security Council, Security Council Unanimously Adopts Wide-Ranging Anti-Terrorism Resolution, U.N. Press Release SC/7158 (Sep. 28, 2001), *available at* http://www.un.org/News/Press/docs/2001/sc7158.doc.htm; G.A. Res. 56/1, ¶¶ 3-4, U.N. Doc. A/RES/56/1 (Sep.12, 2001), *available at* http://www.un.org/documents/ga/docs/56/agresolution.htm; Press Release, Security Council, Security Council Condemns in Strongest Terms Terrorist Attacks on United States, U.N. Press Release SC/7143 (Sep. 12, 2001), *available at* http://www.un.org/News/Press/docs/2001/SC7143.doc.htm; Lord Robertson, NATO Secretary General, Statement by NATO Secretary General (Oct. 2, 2001), *available at* http://www.nato.int/ docu/speech/2001/s011002a.htm.

35. AUMF, *supra* note 25, at 6.

36. *Id.* at 4.

37. Instead, the AUMF provided the President authority to use force against specific targets – those "nations, organizations, or persons" the President determined "planned, authorized, committed, or aided" the terrorist attacks on 9/11 as well as those who "harbored such organizations or persons." *Id.* at 6. *See also* Bradley & Goldsmith, *supra* note 5.

38. AUMF, *supra* note 25, at 3.

This geographical expansiveness, and the line of logic that flows from it,[39] has been a lightning rod for criticism both within the United States and abroad. In fact, some have argued that targeting operations conducted outside the geographical battlefield do not fall under the law of armed conflict at all, but under the criminal law, and therefore such operations constitute unlawful killings.[40] Those who take this position typically oppose the idea of a "global battlefield," preferring the more traditional territorially-contained battlefield – in this case, the territory of Afghanistan.[41] Of course, in practice, the United States will almost certainly not embrace the broadest application of a "global battlefield" with regard to targeting operations. If there is a government willing and able to either capture or kill a sought-after belligerent within its territory, the United States is not likely to undermine that state's sovereignty and risk the certain diplomatic blowback by targeting the individual anyway. However, in countries such as Pakistan, Somalia, and Yemen, where the respective governments maintain only partial control over their territory and have proven incapable of eliminating, or unwilling to eliminate, terrorist actors and activities, the United States has resorted to territorial incursions through drone strikes.[42] Koh notes that the decision of "whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses."[43] According to the United States, it may conduct such strikes as long as the individuals (e.g., AUMF parties) are

39. Pressed on whether a "little old lady in Switzerland" could be considered an enemy combatant if she donated money to al Qaeda, the United States Government responded in the affirmative. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 475 (D.D.C. 2005). The Obama Administration may have come up with a different response, but it seems apparent that the underlying policy continues of taking the fight to al Qaeda and their supporters wherever the United States finds them.

40. See, e.g., Rise of Drones II: Unmanned Systems and the Future of Warfare: Hearing before the U.S. House Subcommittee on National Security and Foreign Affairs, 111th Cong. 2 (Apr. 28, 2010) (written testimony of Mary Ellen O'Connell, Professor, University of Notre Dame Law School), *available at* http://oversight.house.gov/images/stories/subcommittees/NS_Subcommittee/4.28.10_Drones_II/OConnell_Statement.pdf [hereinafter Rise of Drones II]; Anthony D. Romero, Open Letter to President Obama, COMM. ON OVERSIGHT & GOV'T REFORM (Apr. 28, 2010), http://oversight.house.gov/images/stories/subcommittees/NS_Subcommittee/4.28.10_Drones_II/2010_04_28_ACLU_ADR_Letter_to_President_Obama.pdf, Reply Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction and in Opposition to Defendant's Motion to Dismiss at 16-20, Al-Aulaqi v. Obama, No. 10-cv-01469 (D.D.C. Oct. 8, 2010), *available at* http://www.aclu.org/files/assets/Reply_Brief_FINAL_100810.pdf.

41. *See, e.g.*, Bridget Johnson, *Kucinich: Policy of Drone Strikes Helping Stoke 'Fanaticism,' 'Radicalism,'* The Hill: Blog, (Apr. 24, 2010, 12:20 AM), http://thehill.com/blogs/blog-briefing-room/news/94127-kucinich-obama-policy-of-drone-strikes-helping-inspire-fanatacism-and-radicalism (Representative Dennis Kucinich claims that the United States is violating international law by attacking a country—Pakistan—we are not at war with and who has not attacked us).

42. *See, e.g.,* Scott Shane, Mark Mazzetti & Robert F.Worth, *A Secret Assault on Terror Widens on Two Continents*, N.Y. TIMES, Aug. 15, 2010, *available at* http://www.nytimes.com/2010/08/15/world/15shadowwar.html.

43. Koh, *supra* note 1.

lawfully targetable as belligerents or civilians who have forfeited their protected status.[44]

B. Characterization of the Conflict

While the three branches of the government agree that a state of armed conflict exists and primarily rely upon the law of armed conflict to govern the fight with the groups listed in the AUMF, particularly with regard to lethal targeting operations, the inquiry to identify the proper legal framework does not end there – the law of armed conflict has different rules for the different types of conflict. "International armed conflicts" are traditional armed conflicts between states and are governed by the 1907 Hague Conventions,[45] the four Geneva Conventions of 1949,[46] custom, and, to those that are party, the first Additional Protocol to the Geneva Conventions (AP I).[47] "Conflicts not of an international character" (or "non-international armed conflicts") are armed conflicts between states and non-state actors, including but not limited to internal armed conflicts, and are governed by Common Article 3 of the Geneva Conventions,[48] custom, domestic law, and,[49]

44. See *infra* section III(B)(1) for a fuller explanation on the implications of civilians losing their protected status.

45. Hague Convention IV Respecting the Laws and Customs of War on Land, Annex, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague IV].

46. *See* The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6.3 U.S.T. 3114, 3116, T.I.A.S. No.3362, at 3, 75 U.N.T.S. 31, 32 [GC I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6.3 U.S.T. 3217, 3220, T.I.A.S. No.3363, at 4, 75 U.N.T.S. 85, 86 [GC II]; Geneva Convention Relative to the Treatment to Prisoners of War, Aug. 12, 1949, 6.3 U.S.T. 3316, 3318, T.I.A.S. No. 3364., at 3, 75 U.N.T.S. 135, 136 [GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6.3 U.S.T. 3516, 3518, T.I.A.S. No.3365, at 3, 75 U.N.T.S. 287, 288 [GC IV] [all four hereinafter Geneva Conventions].

47. The United States signed AP I but never submitted it to the Senate for advice and consent. *See* Guy B. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 110 (1985). The U.S. Government has been consistently critical of some of its terms throughout the years, particularly with regard to rules concerning unlawful participants in hostilities and the combatant's privilege. *See, e.g.*, George H. Aldrich, *Prospects for the United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1, 3-4 (1991). However, many in the international community, including the United States, have argued that large parts of Protocol I reflect custom. *See, e.g.*, Hans-Peter Gasser, *An Appeal for Ratification by the United States*, 81 AM. J. INT'L L. 912, 914 (1987). The U.S. government has taken the position in the past that the provisions of Article 75 represent "an articulation of safeguards to which all persons in the hands of an enemy are entitled." *Hamdan v. Rumsfeld*, 548 U.S. 557, 663 (2006) (quoting William H. Taft IV, *Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 322 (2003)). Nevertheless, the scope of customary international law (CIL) is controversial within the United States Government. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter AP I].

48. Common Article 3 is the only article in the four Geneva Conventions of 1949 to provide rules for "armed conflict[s] not of an international character occurring in the territory of one of the High Contracting Parties." GC I-IV, *supra* note 46, art. 3.

49. Some experts have argued that the lack of substantive law for non-international armed conflicts, or internal armed conflicts, reflects the intent for either domestic law or human rights law to fill in the gaps. *See, e.g.*, Gabor Rona, *Obama Administration Must Define "Enemy Combatant"*

to those that are party, the second Additional Protocol to the Geneva Conventions (AP II).[50] Some have pointed to the existence of a third category—*internationalized* non-international armed conflicts, or conflicts between states and non-state actors that feature additional states on one or both sides—and have argued that, because these conflicts are not expressly contemplated by the traditional laws of war, rules from both types of conflict should govern where appropriate.[51]

With these categories in mind, the AUMF conflict presents challenges for proper characterization. The United States was not and has never been in an international armed conflict with al Qaeda, since al Qaeda is not a state and has no government and is therefore incapable of fighting as a party to an inter-state conflict.[52] It is arguable, however, that the United States was at least initially engaged in an international armed conflict with the Taliban as the functional government of Afghanistan, and with al Qaeda forces supporting the Taliban as a

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Consistent With Traditional Laws of War, HUMAN RIGHTS FIRST (February 17, 2009), http://www.humanrightsfirst.org/pdf/091020-LS-rona-obama-admin-define-combatant.pdf. The U.S. Government has asserted that only Common Article 3 applies directly as applicable treaty law to the AUMF conflict, but has preferred to draw analogies from the law of international armed conflict to fill gaps rather than apply human rights law or domestic law. *See, e.g., Hamdan,* 548 U.S. at 630-31.

50. The United States signed AP II and submitted it to the Senate for advice and consent in 1987 where it remains before Senate subcommittees. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter AP II]; *see also* Gasser, *supra* note 47, at 912; Roberts, *supra* note 47, at 110. Much like with Protocol I, many have asserted that certain provisions in Protocol II have achieved the status of custom. *See, e.g.*, Gasser, *supra* note 47, at 912.

51. *See, e.g.*, ROBERT K. GOLDMAN & BRIAN TITTEMORE, UNPRIVILEGED COMBATANTS AND THE HOSTILITIES IN AFGHANISTAN: THEIR STATUS AND RIGHTS UNDER INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW 24 n. 82 (2002), *available at* http://www.asil.org/taskforce/goldman.pdf In the report he notes that such conflicts are:

> Hybrid conflicts in that they are not governed entirely by either international or internal armed conflict rules. Because the Geneva Conventions contain no provisions applicable to these kinds of conflicts, the solution followed by most international lawyers has been to break down the armed conflict into its international and domestic components and, based on this differentiation, to identify the humanitarian law rules governing relations between the various warring parties.

See also Dietrich Schindler, *International Humanitarian Law and Internationalized Internal Armed Conflicts*, 22 INT'L REV. RED CROSS 255, 258-61 (1982).

52. *But see* Brief for Respondents at 48, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05-184), 2006 WL 460875 (arguing that "[a]s the President determined, because the conflict between the United States and al Qaeda has taken place and is ongoing in several countries, the conflict is 'of an international character'"). However, the *Hamdan* Court disagreed with the government's position, finding:

> The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being 'international in scope,' does not qualify as a 'conflict not of an international character.' . . . That reasoning is erroneous. . . . In context, then, the phrase 'not of an international character' bears its literal meaning.

Hamdan, 548 U.S. at 630-31.

kind of militia.[53] The Taliban maintained some form of governance over Afghanistan, occupied the capital, conducted foreign relations, and proved to be the most powerful military force in the country with its defeat of rival tribal alliances.[54] However, because the Taliban was only recognized by a handful of states as the rightful government of Afghanistan,[55] did not occupy Afghanistan's seat at the UN, and maintained only erratic control over large portions of its own territory, the Taliban may not have met the basic requirements for recognition as Afghanistan's government.[56] Additionally, while most of the conflict with Taliban forces occurred within the borders of Afghanistan, fighting and targeting, including through drone strikes, of non-Taliban belligerents and terrorists took place throughout the region.[57] In any event, after Afghanistan ratified a new constitution and elected a democratic government in January and October of 2004, respectively, followed by the new government fighting alongside U.S. Forces and International Security Assistance Forces (ISAF), the conflict would no longer qualify as "international."

However, characterization of the conflict as non-international is also difficult. Although there are no states fighting against states in the current conflict, the drafters of the Geneva Conventions seemed to be thinking more of internal armed conflicts when they provided the sparse terms for "armed conflicts not of an international character" in Common Article 3 and not of global struggles with transnational non-state actors.[58] It seems at least debatable, then, that the AUMF

53. Even if al Qaeda forces acted as a Taliban militia, fought alongside them in defense of Afghan territory, and considered themselves a part of the opposition force, it is doubtful that al Qaeda fighters would have qualified for the protected status outlined in GC III, art. 4(A)(1) and (2). Al Qaeda fighters were not a regular militia or volunteer corps forming "part of" Afghanistan's armed forces as contemplated by art. 4(A)(1); similarly, al Qaeda did not satisfy three of the four listed criteria in art. 4(A)(2) required of "other militias" to earn protected combatant status: they did not wear a fixed sign, they did not carry arms openly, and they did not conduct their activities in compliance with the law of war.

54. *See* Greg Bruno, *The Taliban in Afghanistan,* COUNCIL ON FOREIGN RELATIONS: BACKGROUNDER (August 3, 2009), http://www.cfr.org/publication/10551/taliban_in_afghanistan.html; *see also* Saeed Shah, *Taliban Rivals Unite to Fight US Troop Surge,* THE GUARDIAN (March 3, 2009), http://www.guardian.co.uk/world/2009/mar/03/taliban-pakistan-afghanistan-us-surge.

55. On September 11, 2001, only Pakistan, Saudi Arabia, and the United Arab Emirates recognized the Taliban as the government of Afghanistan. Tony Karon, *Time.com Primer: The Taliban and Afghanistan*, TIME.COM (Sept. 18, 2001), http://www.time.com/time/nation/article/ 0,8599,175372, 00.html.

56. At a basic level, state practice suggests that a political entity must fulfill four criteria to achieve international recognition as a country's government: (1) assume a permanent character, (2) prove itself to be substantially in control of the country, (3) demonstrate the support of the majority of the country, and (4) show the ability to abide by international agreements. *See* Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19. Some have argued that the Taliban met the first three of these criteria, but its abhorrent human rights record and failure to comply with international agreements led all but three countries to refuse recognition of the Taliban as the government of Afghanistan. *See* Karon, *supra* note 55.

57. *See, e.g.,* Ismail Khan & Salman Masood, *Drone Strikes Reported in Pakistan*, N.Y. TIMES, Jan. 6, 2010, *available at* http://www.nytimes.com/2010/01/07/world/asia/07drones.html.

58. *See, e.g.,* Memorandum from John Yoo, Deputy Assistant Attorney General, Memorandum for Alberto R. Gonzales Counsel to the President, Treaties and Laws Applicable to the Conflict in

conflict may transcend the characterization of "non-international" and more closely resemble an "international armed conflict," since the United States not only fights in a number of countries but fights alongside both Afghan forces and a coalition of UN-sanctioned ISAF forces. At least for purposes of filling gaps in the law, analogizing the AUMF conflict to international armed conflicts might provide a fuller and more comprehensive set of rules than by looking to the customary rules supporting non-international armed conflicts or to some other less relevant body of law. The Bush Administration consistently asserted that the conflict with AUMF parties was international – particularly with regard to the global fight against al Qaeda.[59] However, taking its position from the Supreme Court's decision in *Hamdan v. Rumsfeld*,[60] the Obama Administration now takes the position that the conflict is non-international in nature.[61] For purposes of determining the proper legal framework for targeting operations in the AUMF conflict, the Court's determination that the fight with al Qaeda and associates is a non-international armed conflict and the current Administration's adoption of that characterization sufficiently answers this preliminary question.

C. Sources of Law

It follows, then, that the primary legal framework applicable to drone attacks conducted in the current conflict is the *lex specialis* of armed conflict, and that the status of this conflict is non-international. As a result, as noted above, Common Article 3 and customary international law, including provisions from Additional Protocols I and II, expressly apply as sources of law for this conflict. In addition,

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Afghanistan and to the Treatment of Persons Captured by U.S. Armed Forces In that Conflict (Nov. 30, 2001), http://www.justice.gov/olc/docs/aclu-ii-113001.pdf (Yoo argues that while the rules of international armed conflict do not apply to al Qaeda, Common Article 3 also does not cover the conflict between a state Party and a non-state actor:

> There is substantial reason to think that this language [common Article 3] refers specifically to a condition of civil war, or a large-scale armed conflict between a State and an armed movement within its territory. . . . Analysis of the background to the adoption of the Geneva Conventions in 1949 confirms our understanding of common Article 3. It appears that the drafters of the Conventions had in mind only the two forms of armed conflict that were regarded as matters of general *international* concern at the time: armed conflict *between* Nation States (subject to Article 2), and large-scale civil war *within* a Nation State (subject to Article 3). . . . [C]ommon Article 3 should not be read to include all forms of non-international armed conflict.).

59. *See, e.g.*, Memorandum from George W. Bush, Humane Treatment of Taliban and al Qaeda Detainees (Feb. 7, 2002), http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

60. Hamdan v. Rumsfeld, 548 U.S. 557, 630, 633 (2006). The Court did not take a position on whether the conflict had always been non-international or whether that mattered, but it did expressly reject the Executive's argument that the conflict was international. In finding that the conflict with the Taliban and al Qaeda is non-international in character, the *Hamdan* Court correctly determined that Common Article 3 governs. *Id.* at 630. Interestingly, though, the Court looked to Article 75 of Protocol I to flesh out the terms of Common Article 3 instead of Articles 4-6 of Protocol II. *Id.* at 633. Protocol I expressly supplements the rules for *international* armed conflicts, while Protocol II supplements the rules for *non*-international armed conflicts. *See* AP I, *supra* note 47; AP II, *supra* note 50.

61. *See, e.g.*, Koh, *supra* note 1.

the UN Charter provides basic *jus ad bellum* rules for the application and use of force.[62] So, too, do other treaties generally applicable to armed conflict apply to targeting operations in a non-international armed conflict, including the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (CCW), and the customary provisions within the 1998 Rome Statute of the International Criminal Court.[63] In order to supplement the relatively sparse terms of the law of non-international armed conflicts, the United States has also chosen to use international armed conflict principles from the Hague and Geneva Conventions by analogy.[64] And, of course, whatever domestic rules Congress, the President, or the Department of Defense prescribe for the current conflicts apply as sources of law, subject to an expanding role for the courts in reviewing aspects of the rules adopted by the Executive or Legislative branches (e.g., in *Hamdan* and *Boumediene*).

The President may still choose to treat belligerents as criminals within a law enforcement framework, including by apprehending suspects and prosecuting them in federal courts for violations of federal criminal law, including the War Crimes Act. But he is under no obligation to do so, and he may continue to use the law of war framework for targeting operations for as long as hostilities endure between the United States and the Taliban and al Qaeda, respectively.[65]

III. DRONE STRIKES UNDER THE LAW OF ARMED CONFLICT'S FUNDAMENTAL PRINCIPLES

The Obama Administration has been quick to note that targeting operations against the AUMF foes not only meets the requirements of black letter law and relevant custom, but is "conducted consistently with law of war principles," with "great care... taken to adhere to these principles in both planning and execution."[66] Traditionally, the fundamental principles of the *jus in bello* are composed of (a) military necessity, (b) distinction, and (c) proportionality, with many now adding to the list (d) the principle of humanity.

62. *See, e.g.*, U.N. Charter art. 2, para. 4; U.N. Charter art. 51, para. 1; *see also* Karma Nabulsi, *Jus ad Bellum/Jus in Bello* in CRIMES OF WAR A-Z GUIDE (2nd ed. 2007), *available at* http://www.crimesofwar.org/thebook/jus-ad-bellum.html.

63. *See* Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137, 19 I.L.M. 1523, *available at* http://lawofwar.org/cxonventional _weapons_ convention.htm [hereinafter CCW]; Rome Statute of the International Criminal Court, art. 8, July 17, 1998, 2187 U.N.T.S. 3, 37 I.L.M. 1002 [hereinafter ICC].

64. *See, e.g., Hamdan*, 548 U.S. at 603-04.

65. As recognized by GC III, art. 118, parties to a conflict may hold captured belligerents until the cessation of hostilities. In addition, because the belligerents in the AUMF conflict are unprivileged, they are susceptible to criminal punishment even if detained under the law of armed conflict (LOAC). *See* Goldman & Tittemore, *supra* note 51, at 1, 4.

66. Koh, *supra* note 1.

A. The Principle of Military Necessity

Because it is military necessity that drives targeting operations, I begin the analysis with this principle. Generally considered to reflect international custom,[67] Article 52 of Geneva Protocol I requires that armed attacks in wartime be "limited strictly to military objectives" and offer "a definite military advantage."[68] The U.S. Army adds in its field manual on the law of war that military necessity is "[t]hat principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible."[69] Also of note, Article 23 of Hague IV forbids "destroy[ing] or seiz[ing] the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war,"[70] and Article 8 of the Rome Statute defines as a war crime attacks against civilian objects and "[d]estroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war."[71]

For purposes of this analysis, then, the general question of whether drone strikes meet a military necessity is a relatively easy one. As noted above, a number of U.S. Government officials have over the past few years confirmed that drones are an invaluable tool against al Qaeda, Taliban, and associated terrorist forces.[72] In some areas, they are, as the CIA director put it, "the only game in town" because of their ability to find and identify targeted persons and reach into territory that ground forces cannot enter, either for military or political reasons. In one reported case, the United States targeted a senior Taliban official in the impenetrable border region of Pakistan, while he was resting on the roof of a house with his wife and hooked up to a drip for kidney problems.[73] He was wanted for his involvement in a number of suicide bombings and the assassination of Pakistani Prime Minister Benazir Bhutto. The United States would surely assert that in such a situation and others like them, the drone strike offers a "definite military advantage," particularly in a war that is transnational in scope and with enemies intent on hiding among civilians and within failed or semi-failed states and territories. Likewise, the United States would likely argue that such attacks

67. *See, e.g.*, U.S. DEP'T OF ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE 14 (2005) [hereinafter FM 27-10]; *see also* Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 420 (1987).

68. AP I, *supra* note 47, art. 52(2).

69. F.M. 27-10, *supra* note 67, at 164.

70. Hague IV, *supra* note 45, art. 23(g).

71. ICC, *supra* note 63, art. 8. The ICC creates a distinction between international and non-international armed conflicts, with more rules for the former.

72. *See U.S, Airstrikes in Pakistan Called 'Very Effective,' supra* note 15. CIA Director Leon Panetta famously stated in May 2009 that drones were "the only game in town in terms of confronting or trying to disrupt the al Qaeda leadership," asserting that they have been "very precise" and "very limited in terms of collateral damage." *Id.*

73. Peter Finn & Joby Warrick, *Under Panetta, A More Aggressive CIA*, WASH. POST, Mar. 21, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/03/20/AR2010032003343.html. *See also* Radio Interview by Michael Smerconish with President Obama (Aug. 20, 2009), *available at* http://www.whitehouse.gov/the-press-office/radio-interview-president-michael-smerconish.

against belligerents when and where they present themselves is "indispensable for securing the complete submission of the enemy as soon as possible."[74] All reports indicate that drone attacks have become a central part of the U.S. arsenal in the current conflicts and officials have consistently commented on the significant military advantage they offer.[75]

However, evaluating whether conducting a lethal drone strike operation is a military necessity, like evaluating the use of any weapon or weapon platform, requires a case-by-case analysis. In each application, the commander or operator must affirmatively answer that the particular attack in question offers a distinct military advantage for the accomplishment of a military goal. Drone strikes are no different than any other tool or application of force in this respect.

B. The Principle of Distinction

Of course, military necessity is weighed against the other three constraining principles, including the principle of distinction. Considered to reflect a customary definition of distinction, Article 48 of AP I requires that parties to a conflict "at all times distinguish between the civilian population and combatants, and between civilian objects and military objectives."[76] Article 52 then defines those military objectives as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[77] Focusing on the non-combatants in close proximity to the conflict, Article 51 of AP I requires parties to ensure that "[t]he civilian population and individual civilians...enjoy general protection against dangers arising from military operations," and "not be the object of attack."[78] Article 51 also prohibits and defines "indiscriminate attacks."[79] Ambiguously, and therefore more

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74. F.M. 27-10, *supra* note 67, at 164.

75. *See, e.g.*, *U.S, Airstrikes in Pakistan Called 'Very Effective,' supra* note 15.

76. AP I, *supra* note 47, art. 48.

77. *Id.* art. 52(2). Notably, where there is doubt as to whether a civilian object is being used to "make an effective contribution to military action," article 52(3) stipulates that: it shall be presumed not to be so used." *Id.* art. 52(2), (3). The U.S. Army Field Manual adds more detail at para. 40(c):

> Military objectives include, for example, factories producing munitions and military supplies, military camps, warehouses storing munitions and military supplies, ports and railroads being used for the transportation of military supplies, and other places that are for the accommodation of troops or the support of military operations. Pursuant to the provisions of [Hague IV, art. 25], however, cities, towns, villages, dwellings, or buildings which may be classified as military objectives, but which are undefended (para. 39 b), are not permissible objects of attack.

F.M. 27-10, *supra* note 67, para. 40(c).

78. AP I, *supra* note 47, arts. 51(1), (2). The provisions from Article 51 are considered to reflect custom. F.M. 27-10, *supra* note 67, para. 25.

79. AP I, *supra* note 47, art. 51(4). According to Article 51(4):

> Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this

controversially, Article 51(3) forbids the targeting of civilians "unless and for such time as they take a direct part in hostilities."[80] Significantly for this analysis, Article 13 of AP II, governing non-international armed conflicts, provides a version of these provisions from AP I, albeit in pared-down form.[81] Also of note, the Rome Statute includes as war crimes a number of offenses against civilians and civilian objects stemming from failures to adequately distinguish.[82]

More specific to air strikes, Article 25 of the 1907 Hague IV Convention prohibits aerial bombardment "by whatever means" of undefended towns, villages, or dwellings.[83] And, Article 26 requires a commander to do "all in his power" to

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> Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction." *Id.* In addition, Article 51(5) lists "the following types of attacks" as examples of those that are indiscriminate: "(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Id. art. 51(5).

80. AP I, *supra* note 47, art. 51(3). Notably, AP II, article 13(3) contains the same provision. AP II, *supra* note 50, art. 13(3). Sections III(B)(1) and IV(C) of this article address the controversy surrounding this language in detail.

81. Art. 13 provides:

> 1) The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances. 2) The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. 3) Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.

AP II, *supra* note 50, art. 13.

82. In Article 8(2)(b) the following represent "serious violations of the laws and customs applicable in international armed conflict," and constitute war crimes under the statute for international armed conflicts:

> (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
>
> (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
>
> (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
>
> (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives.

ICC, *supra* note 63, arts. 8(2)(b), (e). Note that only (i) is repeated in Article 8(2)(e) as a war crime for non-international armed conflicts. *Id.* art. 8(2)(e).

83. Hague IV, *supra* note 45, art. 25.

warn "authorities" before an aerial bombardment, "except in cases of assault."[84] In addition, while never formally entered into force, the 1923 Hague Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare provides a number of specific rules that may reflect custom for aerial warfare that apply to all air targeting operations, including those conducted with drones.[85] Article 22 forbids "[a]ny air bombardment for the purpose of terrorizing the civil population or destroying or damaging private property without military character or injuring non-combatants."[86] Article 24(1) then provides that "[a]n air bombardment is legitimate only when it is directed against a military objective, i.e. an objective whereof the total or partial destruction would constitute an obvious military advantage for the belligerent."[87] Moreover, Article 24(3) forbids aircraft from conducting "undiscriminating bombardment."[88]

Thus, it seems clear from convention and customary law that in order for a drone strike to comply with the principle of distinction, the operator may target only combatants or military objectives, and not civilians or civilian objects, unless the civilian or object has forfeited his protected status by participating in the hostilities. The difficulty with the AUMF conflict is that the line between combatant and civilian, and military objective and civilian object, is often blurry and undefined. Therefore, in order to determine whether U.S. drone strikes meet the requirements of distinction we must establish (i) whether the strikes sufficiently distinguish between civilian and military targets, taking into account the loss of civilian protected status by direct participants, and (ii) whether the attacks are conducted indiscriminately, or without regard to the effects on the civilian population.

1. Do Drone Strikes Distinguish Between Civilian and Military Targets?

The difficulty with the AUMF conflict is that the enemy intentionally fails to distinguish himself—indeed purposefully obfuscating his belligerent status by posing as a civilian—and in many cases targets civilians and conducts operations in civilian settings. Al Qaeda and its associates also routinely use protected persons and objects as shields.[89] The United States is thus often forced to fight AUMF parties in a civilian context. This situation requires the United States to do all it can to ensure that it is targeting the right kind of individuals (belligerents), and, if civilians are targeted, to ensure that such individuals have forfeited their protected status by directly participating in hostilities.

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84. *Id.* art 26.

85. Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare. Drafted by a Commission of Jurists at the Hague, December 1922 - February 1923.

86. *Id.* art. 22.

87. *Id.* art. 24(1).

88. *Id.* art. 24(3).

89. *See, e.g.*, Ron Synovitz, *U.S. Says Al-Qaeda Used Afghan Children as Human Shields*, RADIO FREE EUROPE RADIO LIBERTY (June 18, 2007), http://www.rferl.org/content/article/1077179.html; *Afghanistan Midyear Report on Protection of Civilians in Armed Conflict 2010*, UNITED NATIONS ASSISTANCE MISSION IN AFGHANISTAN, (Aug. 2010), http://unama.unmissions.org/Portals/UNAMA/Publication/August102010_MID-YEAR%20REPORT%202010_Protection%20of%20Civilians%20in%20Armed%20Conflict.pdf.

As noted above, only combatants (or civilians who directly participate in hostilities)[90] may be lawfully targeted in an armed conflict.[91] Lawful combatants are those individuals who fight for a state's armed forces or militia, or belong to one of the groups described in GC III, Article 4 and report to a responsible chain of command, distinguish themselves, carry their arms openly, and conduct their actions in compliance with the laws and customs of war.[92] If an individual does not meet these criteria, he is not a lawful combatant and is engaging in the conflict without privilege; therefore, he is either an unlawful combatant (or unprivileged belligerent) or a civilian who has forfeited his protected status.[93] Members of al Qaeda, the Taliban, and their associates do not meet the requirements of lawful combatancy,[94] and therefore are unlawful combatants or unprotected civilians.

The question of when, or under what circumstances, a civilian loses his protected status has long been debated and is of great import to the issue at hand. In an attempt to flesh out the meaning of the phrase, "unless and for such time as they take a direct part in hostilities,"[95] the International Committee of the Red Cross (ICRC) conducted a five-year study and consultation with experts, resulting in its issuing guidance for determining the proper interpretation.[96] According to the ICRC report, a person must perform a "continuous combat function" in order to be targetable as a combatant.[97] The ICRC distinguishes the case of civilians

90. The concept of civilian participation in hostilities is addressed in the immediate paragraphs below.

91. In a non-international armed conflict, some argue that the law of war does not recognize a combatant status for any but the state actor's armed forces. Thus, it becomes even more important to determine when civilians lose their protected status and become targetable.

92. GC III, *supra* note 46, art. 4. For a comprehensive and authoritative analysis on privileged/unprivileged belligerency, *see* Richard R. Baxter, *So Called Unprivileged Belligerency: Spies, Guerrillas and Saboteurs,* 28 BRIT. Y.B. INT'L L. 323, 323-46 (1951); *see also* GOLDMAN & TITTEMORE, *supra* note 51, at 2-4 (identifying the characteristics of lawful combatants/privileged belligerents, and unlawful combatants/unprivileged belligerents).

93. *But see* Marco Sassoli, *Use and Abuse of the Laws of War in the "War on Terrorism,"* 22 LAW & INEQ. 195, 209 (2004); Goldman & Tittemore, *supra* note 51, at 32 n.108. Some in the international community have refuted the notion that there is a third category in the law of war, separate from combatants and civilians. However, such critics note that even characterizing terrorists as civilians does not lead to perverse results – so long as such individuals "take a direct part in hostilities" and directly aid the efforts of the enemy, they forfeit their protected civilian status and become as targetable as combatants.

94. Members of al Qaeda, the Taliban, and their associates do not meet any of the requirements from GC III, art. 4, i.e., they do not belong to a state party, do not constitute an accompanying militia, and do not meet the four criteria (distinctive sign or uniform, carry arms openly, chain of command, and compliance with the laws of war) to grant them the combatant's privilege. *But see POWs or Unlawful Combatants?* CRIMES OF WAR PROJECT, (Jan. 2002), http://www.crimesofwar.org/expert/pow-intro.html (taking the position that the Taliban and possibly al Qaeda met the requirements for POW status as of 2002).

95. AP I, *supra* note 47, art. 51(3); AP II, *supra* note 50, art. 13(3).

96. INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 33-35 (2009), *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0990/$File/ICRC_002_0990.PDF [hereinafter ICRC DPH Guidance].

97. *Id.* at 34. The ICRC continues:

engaged in a "continuous combat function," who make up the "organized fighting forces" of a non-state actor, from "civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions."[98] Civilians who engage in such temporary or non-combat conduct, the ICRC argues, may only be targeted for the time they are engaged in hostile conduct.[99]

Of course, many disagree with the ICRC's position on the meaning of direct participation in hostilities.[100] The Obama Administration, for example, suggests that individuals who are merely "part of... an armed group are belligerents and, therefore, lawful targets under international law."[101] "Indeed," Koh asserts,

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> Continuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict. Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act.

Id.

98. *Id.* at 33-34. More specifically, the ICRC continues, those designated as engaged in "continuous combat function" must be distinguished from:

> Persons comparable to reservists who, after a period of basic training or active membership, leave the armed group and reintegrate into civilian life. Such 'reservists' are civilians until and for such time as they are called back to active duty. Individuals who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities, are not members of that group within the meaning of IHL. Instead, they remain civilians assuming support functions, similar to private contractors and civilian employees accompanying State armed forces. Thus, recruiters, trainers, financiers and propagandists may continuously contribute to the general war effort of a non-State party, but they are not members of an organized armed group belonging to that party unless their function additionally includes activities amounting to direct participation in hostilities. The same applies to individuals whose function is limited to the purchasing, smuggling, manufacturing and maintaining of weapons and other equipment outside specific military operations or to the collection of intelligence other than of a tactical nature. Although such persons may accompany organized armed groups and provide substantial support to a party to the conflict, they do not assume continuous combat function and, for the purposes of the principle of distinction, cannot be regarded as members of an organized armed group. As civilians, they benefit from protection against direct attack unless and for such time as they directly participate in hostilities, even though their activities or location may increase their exposure to incidental death or injury.

Id. at 34-35.

99. *Id.* at 70 (conceding that civilians may be targeted if they are on their way or returning from hostilities, but insisting that the "'revolving door' of civilian protection is an integral part, not a malfunction, of IHL").

100. *See, e.g.*, W. Hays Parks, *Direct Participation in Hostilities: Perspectives on the ICRC Interpretive Guidance: Part IX of the ICRC "Direct Participation In Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769 (2010).

101. Koh, *supra* note 1.

"targeting particular individuals serves to narrow the focus when force is employed and to avoid broader harm to civilians and civilian objects."[102] Yoram Dinstein similarly argues:

> [A] person is not allowed to wear simultaneously two caps: the hat of a civilian and the helmet of a soldier. A person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a lawful combatant. He is an unlawful combatant. He is a combatant in the sense that he can be lawfully targeted by the enemy, but he cannot claim the privileges appertaining to lawful combatancy. Nor does he enjoy the benefits of civilian status.[103]

The ICRC's position that participants who only "sporadically" involve themselves in hostilities or who are not engaged in combat-type functions (and therefore not part of an organized fighting force) may not be targeted seems to misunderstand grossly the nature of the AUMF conflict. As a transnational non-state terrorist organization, al Qaeda's sole purpose is to achieve ideological objectives through violent means. Presumably, every member of al Qaeda and its affiliates supports that unlawful mission – from the propagandists to the financiers, and from the religious leaders to the front-line fighters. In fact, al Qaeda members are often ordered to remove themselves from the fight for a time in order to re-group, train, switch theaters, join "sleeper cells," and a variety of other reasons.[104] In each scenario, the member is still very much engaged in hostilities (or performing a "continuous combat function") against the United States by actively following orders and participating according to his assigned duties. But under the ICRC's definition, such individuals would likely not be covered under the designation. Thus, to allow a state to target a terrorist only for such time as he is engaged in an actual hostile act is to give the terrorist the best of both worlds – the protections of a civilian and the rights of a combatant. Presumably, it is for this reason that the U.S. government takes a broader view of which individuals fall under the category of belligerents or unprotected civilians who are targetable under the law of war.

So, too, is there debate on when, or under what circumstances, a civilian *object* gives up its protected status. The argument turns upon the "nature, location, purpose, or use" of the object.[105] If a civilian object is employed in such a way that its nature, location, purpose, or use meets the criteria for a military objective as defined in Article 52 of AP I, that object loses its protected status and may be targeted.[106] Of course, military objectives must also make an "effective

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102. *Id.*

103. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 29 (2004).

104. Eric Schmitt & Jane Perlez, *Strikes Worsen Qaeda Threat, Pakistan Says*, N.Y. TIMES, Feb. 25, 2010, at A1, *available at* http://www.nytimes.com/2009/02/25/world/asia/25drones.html.

105. AP I, *supra* note 47, art 52(2).

106. Dinstein, *supra* note 103, at 88. Dinstein offers a definition for each of these terms:

> Nature denotes the intrinsic character of the military objective. . . . [T]he 'purpose' of a military objective is determined either by its (inherent) nature or

contribution to military action" and "offer[] a definite military advantage."[107] In the AUMF conflict, this analysis comes up frequently; drones often strike civilian houses, businesses, and vehicles, which by their nature, location, purpose, or use have become militarized. Consider the examples described in the hypothetical scenarios above, where AUMF foes gather in civilian settings, such as homes and boarding houses. There is no doubt that a person's residence is civilian in status, but when the home is used to house belligerents, store weapons, plan or conduct attacks, regroup for future hostilities, train, or any number of other activities that make an effective contribution to the war effort, that home's nature, location, purpose, or use arguably changes in such a way that it forfeits its protected civilian status and becomes a military objective. Again, there is still much debate on this point, and some may apply similar rules for civilian objects as the ICRC applies to civilians directly participating in hostilities.

Therefore, the answer to the question of whether U.S. drone strikes properly distinguish between civilian and combatant, and between civilian object and military objective depends upon the interpretation of when a civilian or civilian object loses its protected status and becomes lawfully targetable. While a good number of U.S. operations in the AUMF conflict occur in traditional skirmishes with enemy forces, the United States typically uses drones to target individuals outside the traditional battlefield, in civilian areas where they may or may not be engaged in hostile activities at the time they are struck. As described in open press, drones have targeted individuals in a number of civilian settings, including homes and urban centers.[108] It seems that if the ICRC's interpretation of direct participation in hostilities is used, then many of the United States' drone strikes may not properly distinguish between combatant and civilian—particularly those attacks against "civilians" (*e.g.*, members of al Qaeda, Taliban, and associated forces who perform only political, religious, or other "non-combat" functions for the group) located in their homes. However, if one concludes that membership in an inherently violent non-state armed group within a recognized armed conflict severs an individual's civilian protected status, then drone strikes that target such individuals likely meet the requirement to distinguish.

2. Are Drone Strikes Conducted Indiscriminately?

Even if drone strikes properly distinguish between combatant and civilian, the United States must still ensure that it conducts strike operations discriminately to meet the requirements of distinction. An indiscriminate attack can be described as "one in which the attacker does not take measures to avoid hitting non-military objectives, that is, civilians and civilian objects," including by "using means and methods that... cannot be directed at specific military objectives or whose effects

> by its (*de facto*) use. . . . Actual 'use' of an objective does not depend necessarily on its original nature or on any (later) intended purpose.

Id. at 88-90.

107. AP I, *supra* note 47, art 52(2).

108. Joby Warrick & Peter Finn, *Amid Outrage Over Civilian Deaths in Pakistan, CIA Turns to Smaller Missiles*, WASH. POST, April 26, 2010, at A8, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/04/25/AR2010042503114.html.

cannot be limited."[109] In other words, indiscriminate attacks are those that by their nature are so imprecise or ill-defined that collateral effects are assured. Customary law, reflected in Article 57(1) and (4) of AP I,[110] requires parties to an armed conflict to exercise "constant care" and to "take all reasonable precautions" to spare the civilian population and avoid damage to civilian objects.[111] Article 57(3) further requires that when given the option, parties select the military objective most likely to "cause the least danger to civilian lives and to civilian objects."[112]

With their ability to surveil for hours or days at a time, and to perform surgical strikes with pinpoint accuracy, drones typically offer a cleaner alternative to other forms of aerial bombardment or missile strikes.[113] P.W. Singer writes that "[u]nmanned systems seem to offer several ways of reducing the mistakes and unintended costs of war," including by using "far better sensors and processing power...allow[ing] decisions to be made in a more deliberate manner," and "remov[ing] the anger and emotion from the humans behind them."[114] "Such exactness," Singer argues, "can lessen the number of mistakes made, as well as the number of civilians inadvertently killed."[115] Senior U.S. officials have consistently stated that "procedures and practices for identifying lawful targets" in the AUMF conflict "are extremely robust, and advanced technologies have helped to make our targeting even more precise."[116] Indeed, U.S. officials would certainly argue that

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109. ROY GUTMAN & DAOUD KUTTAB, *Indiscriminate Attacks*, *in* CRIMES OF WAR 2.0, 239, 239-40 (2007).

110. *See* AP I, *supra* note 47, art. 57(1), (4).

111. *Id.* More specifically, Article 57(2) provides:

> With respect to attacks, the following precautions shall be taken: (a) those who plan or decide upon an attack shall: (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them; (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects; (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; (c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

Id. at art. 57(2).

112. *Id.* at art. 57(3).

113. *See* Singer, *supra* note 14, at 397-98.

114. *Military Robots and the Laws of War*, *supra* note 16.

115. *Id.*

116. Koh, *supra* note 1. Koh continues: "In my experience, the principles of distinction and proportionality that the United States applies are not just recited at meetings. They are implemented

an advantage of using drones for targeting operations is that it actually promotes the humanitarian objective of sparing civilians by conducting more precise attacks on belligerents.[117] Still, because of the location of the strikes—typically in civilian settings—there are almost always civilian casualties.[118] Although one could argue that drones offer a more discriminating alternative to aerial bombing or traditional ground applications of force (tanks, long-range guns and missiles, etc.), it is incumbent upon a drone operator and commander to exercise judgment in determining when to conduct an attack where there are co-located civilians or where the targets themselves are difficult to identify.

Thus, insofar as drone strikes target military objectives, combatants, or unprivileged civilians (i.e., those who are directly participating in hostilities at the time of the attack), and as long as such attacks are conducted with constant care, reasonable precaution, and proper consideration of the likely collateral effects, drones offer a more precise and adaptable means for bombardment than traditional weapons and meet the requirement of discrimination. There may still be concern that because of this precision and effectiveness, the decision to use force becomes easier and more frequent. And there may also be concern with drone strikes' dependency on reliable intelligence for acquisition of targets. However, neither concern is unique to the employment of drones in warfare, and both are the kinds of questions that merit consideration before any application of force, including with drones.

C. The Principle of Proportionality

Much like the discussion on indiscriminate attacks, the principle of proportionality considers the effects of an attack on civilian objects and civilians in relation to the achievement of a military goal. Reflecting this principle, Article 51(5) of AP I prohibits "attack[s] which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be *excessive* in relation to the concrete and direct military advantage anticipated."[119] Similarly, Article 57 requires military planners and decision-makers to "[r]efrain from deciding to launch any attack which may be expected to cause incidental... [but] *excessive* [losses]... in relation to the concrete and direct military advantage anticipated."[120] The U.S. Army Field Manual on counterinsurgency, which is not a restatement of law of war requirements but does reflect law of war-influenced U.S. counterinsurgency (COIN) policy, adds to this definition two positive commitments for combatants: (1) to "[p]reserve noncombatant lives by limiting the damage they do," and (2) to "[a]ssume additional risk to minimize potential harm."[121]

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rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law."

Id.

117. *Id.*

118. *See, e.g.*, Finn, *supra* note 73.

119. AP I, *supra* note 47, art. 51(5)(b) (emphasis added).

120. *Id.* art. 57(2)(a)(iii) (emphasis added).

121. U.S. DEP'T OF ARMY, FIELD MANUAL 3-24: COUNTERINSURGENCY ¶¶ 7-30 (2006)

Notably, the Rome Statute includes proportionality-related war crimes within the ICC's jurisdiction – in Article 8(2)(a)(iv) for "[e]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly,"[122] and in Article 8(2)(b)(iv) for "[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects... which would be *clearly excessive* in relation to the concrete and direct overall military advantage anticipated."[123] In other words, attacks that result in civilian casualties do not by themselves constitute war crimes; but reckless attacks that result in civilian deaths or destruction, or attacks that knowingly take civilian lives clearly in excess of what is necessary for accomplishing the military objective could violate the principle of proportionality and constitute war crimes.

Importantly for the AUMF and Afghanistan conflicts, although not necessarily reflecting a legal requirement, the Field Manual on counterinsurgency adds:

> In conventional operations, proportionality is usually calculated in simple utilitarian terms: civilian lives and property lost versus enemy destroyed and military advantage gained. But in COIN operations, advantage is best calculated not in terms of how many insurgents are killed or detained, but rather *which* enemies are killed or detained. If certain key insurgent leaders are essential to the insurgents' ability to conduct operations, then military leaders need to consider their relative importance when determining how best to pursue them. In COIN environments, the number of civilian lives lost and property destroyed needs to be measured against how much harm the targeted insurgent could do if allowed to escape. If the target in question is relatively inconsequential, then proportionality requires combatants to forego severe action, or seek noncombative means of engagement.[124]

In its current conflicts, the U.S. military has often determined that proportionality concerns with co-located civilians prevented it from striking certain military objectives.[125] However, in the recently reported targeting of Hussein al-Yemeni,[126] like the reported strike on Pakistani Taliban leader Baitullah Mehsud,[127] and in addition to many other similar attacks against senior terrorist

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[hereinafter FM 3-24].

122. ICC, *supra* note 63, art. 8(2)(a)(iv) (emphasis added).

123. *Id.* art. 8(2)(b)(iv) (emphasis added).

124. FM 3-24, *supra* note 121 (emphasis added).

125. *See, e.g.*, Koh, *supra* note 1; *Secrecy of U.S. Drone Strikes in Pakistan Criticized,* DAWN.COM (Jan. 30, 2010, 11:08 AM), http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/04-drone-secrecy-criticised-qs-02.

126. David E. Sanger, *Drone Strike Said to Kill a Leader of Al Qaeda*, N.Y. TIMES, Mar. 18, 2010, at A10, *available at* http://www.nytimes.com/2010/03/18/world/asia/18terror.html. Al-Yemeni was reportedly a senior al Qaeda leader located in Waziristan and wanted for his involvement in the killings of several CIA operatives in December 2009.

127. Pir Zubair Shah, Sabrina Tavernise & Mark Mazzetti, *Taliban Leader in Pakistan Is Reportedly Killed*, N.Y. TIMES, Aug. 8, 2009, at A1, *available at* http://www.nytimes.com/

leaders in Afghanistan, Pakistan, and elsewhere,[128] the United States has also demonstrated at times a determination that the risks to co-located civilians were justifiable since the targets were of sufficiently high rank and capable of substantial future harm. Indeed, as U.S. officials have noted, targeting particular individuals with advanced technologies often serves the purpose of avoiding broader harm to civilians and civilian objects.[129]

However, there is great disagreement on this point. Critics of drone targeting allege that the number and frequency of civilian deaths are immensely disproportionate to the military advantage they provide.[130] Using public news reports as sources, some estimates put civilian losses at approximately one out of every three fatalities caused by drone attack.[131] A recent survey of Pakistanis revealed that they thought almost all the casualties from drone strikes were civilian.[132] Still others, including the *Long War Journal*[133] and intelligence officials,[134] place the number much lower. Some also assert that the military advantage of many of the drone attacks is minimal to nil, because either the importance of the target is often overstated or, more importantly, because the civilian losses generate increased hostility among the civilian population, thereby fueling and prolonging the hostilities.[135]

2009/08/08/world/asia/08pstan.html.

128. The *Long War Journal* reports that 1,438 al Qaeda, Taliban, and affiliate leaders and operatives have been killed by drones since 2006. Bill Roggio & Alexander Mayer, *Charting the Data for US Airstrikes in Pakistan, 2004 – 2010*, THE LONG WAR JOURNAL (Sept. 21, 2010, 8:22 PM), http://www.longwarjournal.org/pakistan-strikes.php.

129. Koh, *supra* note 1.

130. *Secrecy of U.S. Drone Strikes in Pakistan Criticized*, *supra* note 125; *Rise of Drones II*, *supra* note 40, at 5-6.

131. *NSJ Analysis: Turning Off Autopilot: Towards a Sustainable Drone Policy*, HARVARD NATIONAL SECURITY JOURNAL (Mar. 6, 2010), http://www.harvardnsj.com/2010/03/nsj-analysis-turning-off-autopilot-towards-a-sustainable-drone-policy/ (citing an analysis of the U.S. policy of UAV drones strikes against al-Qaeda and Taliban operatives in Pakistan by Peter Bergen and Katherine Tiedemann).

132. *Secrecy of U.S. Drone Strikes in Pakistan Criticized*, *supra* note 125.

133. Roggio & Mayer, *supra* note 128 (referencing data that indicates 6.7% of airstrike fatalities since 2006 have been civilian).

134. Finn & Warrick, *supra* note 73.

135. *See, e.g.*, *Rise of Drones II*, *supra* note 40, at 5-6. O'Connell concluded her testimony by arguing that:

> The use of military force in counter-terrorism operations has been counter-productive. Military force is a blunt instrument. Inevitably unintended victims are the result of almost any military action. Drone attacks in Pakistan have resulted in large numbers of deaths and are generally seen as fueling terrorism, not abating it. In Congressional testimony in March 2009, counter-terrorism expert, David Kilcullen, said drones in Pakistan are giving 'rise to a feeling of anger that coalesces the population around the extremists and leads to spikes of extremism well outside the parts of the country where we are mounting those attacks.' Another expert told the *New York Times*, 'The more the drone campaign works, the more it fails—as increased attacks only make the Pakistanis angrier at the collateral damage and sustained violation of their sovereignty.'

Id. at 6.

Determining whether drone strikes meet the requirements of proportionality will always be a case-by-case analysis. Higher numbers of civilian casualties may meet the proportionality test, for example, if the target is a very senior leader of the enemy whose elimination may more likely lead to a quicker cessation of hostilities and fewer military and non-military deaths. On the other hand, striking low-level fighters or supporters in public places, where collateral damage is virtually assured, may not meet the test. Thus, the number of civilians killed, or of terrorists killed, is only the first part of the analysis—whether the target was of sufficient value and whether the strike offered a real military advantage and was conducted with all due caution and concern for civilians establishes the operation's proportionality. Again, this test is not unique to drone attacks, but because drones are used primarily and frequently in civilian contexts, the proportionality analysis merits greater examination.

It bears noting, before moving on, that the fact that drones represent a vastly superior tool for the application of force when compared to the enemy's technological capabilities does not make the use of drones inherently disproportionate. For one, the enemy's "inferior" weapons (e.g., small arms and improvised explosive devices) have proven to be abundantly lethal. But more importantly, the law of war does not require parties to fight with equal strength or ability—only with equal respect for and compliance with the rules. Just as one army's superior discipline and training does not constitute a disproportionate advantage over an opponent's poorly-trained and undisciplined forces, use of superior technology does not by itself violate the principles of the law of war. Thus, remotely firing Hellfire missiles from thousands of feet in the air on belligerents engaged in lethal operations using rudimentary explosives does not by itself violate the principle of proportionality.

D. The Principle of Humanity

The final principle in this analysis is that of humanity. Article 22 of Hague IV reflects the purpose of the humanity principle, affirming that "[t]he right of belligerents to adopt means of injuring the enemy is *not unlimited*."[136] Likewise, Article 23 prohibits parties from "employ[ing] arms, projectiles, or material calculated to cause *unnecessary suffering*."[137] These same provisions are repeated in Article 35 of AP I,[138] in paragraphs 33 and 34 of the U.S. Army Field Manual on the law of war,[139] and in the preamble to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW).[140] The principle of humanity may be understood as the capstone of the other constraining principles, requiring parties to a conflict to exercise restraint when an act would

136. Hague IV, *supra* note 45, art. 22 (emphasis added).
137. *Id.* art. 23 (emphasis added).
138. AP I, *supra* note 47, art. 35.
139. FM 27-10, *supra* note 67, at 33-34.
140. CCW, *supra* note 63.

cause superfluous injury or unnecessary suffering, even if it meets the requirements of necessity, distinction, and proportionality.

To be sure, not many would assert that the application of drones as a military tool inherently violates the principle of humanity. There is no evidence that drone strikes themselves cause any more injury or suffering than traditional forms of bombardment. But because of the setting in which drones are most often employed, and because of the difficulty in ensuring that the right individuals are being targeted, drone warfare invites more scrutiny than other forms of force. A growing chorus of critics is claiming (perhaps a little ironically, due to their criticism of the United States' detention policy and practices) that drone strikes are taking the place of the more humanitarian option with regard to engaging belligerents – capture and detention.[141] Of course, no official policy exists that instructs operators to kill rather than detain, but critics have pointed to the fact that since the Obama Administration came into office in 2009, hundreds of drone strikes have been launched against high-level terrorists with no high-level captures and detentions.[142]

Compounding this challenge is the inability of, or extreme difficulty for, drones to accept surrender or call back strikes at late stages of deployment.[143] Consider, for example, a hypothetical operation where, as a drone heads for its position, but before its missile hits its mark, the target looks to the skies and unambiguously demonstrates his intent to surrender, thus rendering himself *hors de combat*. On the one hand, one might argue that when conducting an aerial bombing on a lawful target from a traditional manned aircraft, the target does not have a right to surrender once the bombs are dropped. However, the technological ability of drones to survey the ground before and during a strike, and abort a strike at the latest of stages, may complicate the hypothetical. It is possible that the law of armed conflict may require a drone to accept surrender until it is no longer capable of doing so. The implications of such an interpretation, of course, are considerable. After all, how is a drone flying deep into hostile territory, and without nearby ground support (presumably the reason for the drone's use in the first place), to accept surrender and remove the person or persons from the battlefield? And even if this were possible, how is a drone to inform the now *hors de combat* target that he is to stay in place until picked up and detained by

141. *See, e.g.*, Asim Qureshi, *The 'Obama doctrine': kill, don't detain*, THE GUARDIAN (Apr. 11, 2010), http://www.guardian.co.uk/commentisfree/cifamerica/2010/apr/11/obama-national-security-drone-guantanamo; Karen DeYoung & Joby Warrick, *Under Obama, More Targeted Killings Than Captures in Counterterrorism Efforts*, WASH. POST, Feb. 14, 2010, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/02/13/AR2010021303748.html?nav=emailpage.

142. *See, e.g.*, DeYoung & Warrick, *supra* note 141; Richard Murphy & John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 406-14 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1349357.

143. The scenario of surrendering to a drone has occurred at least once. P.W. Singer writes: "In one case, a group of Iraqi soldiers saw a Pioneer flying overhead and, rather than wait to be blown up, waved white bed sheets and undershirts at the drone – the first time in history that human soldiers surrendered to an unmanned system." *Military Robots and the Laws of War*, *supra* note 16.

opposing forces? The prospect of surrendering to a drone is fraught with such practical challenges.

However, in the vast majority of cases, strikes are conducted by surprise and without forewarning. This fact begs another question: is the United States required to warn civilian populations about intended drone strikes in advance of the attack? And if so, what does that warning need to look like? Article 26 of Hague IV requires a commander to do "all in his power" to warn "authorities" before a bombardment, "except in cases of assault."[144] It is not clear under this definition who is required to receive that notification, although it is widely believed that the United States receives some level of consent or permission from Afghan, Iraqi, Pakistani, and Yemeni "authorities" when it conducts strikes in their respective territories. Recently, a collection of experts gathered at Harvard University to develop rules for aerial and missile warfare.[145] Of note, Rule 37 from the group's manual states:

> When the attack of a lawful target by air or missile combat operations may result in death or injury to civilians, effective advance warnings must be issued to the civilian population, unless circumstances do not permit. This may be done, for instance, through dropping leaflets or broadcasting the warnings. Such warnings ought to be as specific as circumstances permit.[146]

It is clear that the law of war contemplates some kind of warning before attacks on civilian locations. However, it is also clear that there are exceptions to the requirement to forewarn under certain situations. In the AUMF conflict, where individuals stage attacks and conduct hostile operations from homes and public places, the United States often depends upon the ability to strike targets when they find them—and to do so quickly and by surprise. Presumably, an attack against a lawful target that depends on the element of surprise for its achievement of the military objective, if conducted as precisely as possible and with proper consideration of the potential collateral effects, would be such an exception and fit within the principle of humanity.

IV. LEGAL BOUNDARIES AND LIMITATIONS FOR DRONE WARFARE

By examining the law of armed conflict's fundamental principles in relation to drone strikes, it is evident that there is plenty of law governing drone warfare—from the Hague and Geneva Conventions and their protocols, to specialized treaties on specific weapons, to custom and usage, and to domestic laws, rules, and regulations. Thus far, most of the analysis in this article has been dedicated to the targets and victims of drone strikes. This section therefore identifies and analyzes

144. Hague IV, *supra* note 45, art. 26.

145. PROGRAM ON HUMANITARIAN POLICE AND CONFLICT RESEARCH AT HARVARD UNIVERSITY, *Foreword* to MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2009), *available at* http://ihlresearch.org/amw/HPCR Manual.pdf [hereinafter HPCR].

146. *Id.* at 18. The Manual adds at Rule 39, "the obligation to take feasible precautions in attack applies equally to UAV/UCAV operations." *Id.*

some of the most prominent actor-focused issues, assessing what, if any, legal boundaries exist and some of the implications of those limitations.

A. Location of the Strike

From the hypothetical scenarios outlined in the introduction, it is clear that location matters when it comes to military operations. When a drone strike occurs within a recognized and accepted theater of active armed conflict, such as Afghanistan or Iraq, there is virtually no question that the attack is covered by the *lex specialis* of the law of armed conflict by virtue of geography. However, when such an attack occurs in areas outside the traditional, geographically limited "hot" battlefield, reasonable people disagree on whether the operation is or should be covered by the law of armed conflict.

The most obvious current issue in this respect is the question of whether or not the border areas of sovereign, independent Pakistan should be considered part of the "Afghanistan theater" of conflict. This issue prompts a few questions: First, is Pakistan part of either the Afghan conflict or the broader AUMF conflict, such that its territory is part of a "theater of conflict"? Second, is consent from Pakistani authorities required to conduct strikes within Pakistani territory? And third, even without consent, does Pakistan's inability or unwillingness to take on terrorists within their territory justify the United States from acting itself regardless of consent? On the first question, some argue that Pakistan is not part of the Afghan theater of war, and consequently, any drone strikes conducted in Pakistan violate the law of armed conflict.[147] However, while there is wide disagreement on whether Pakistan is *de jure* part of the Afghan theater, there is no question that at least its border regions are *de facto* part of the same conflict. Actors regularly stage attacks from the Federally Administered Tribal Area (FATA) of Pakistan, conduct operations into Afghanistan, only to retreat back into the FATA.[148] The non-state participants to the conflict, therefore, do not recognize a territorially-limited war. Moreover, there is no question that Pakistan's territory falls within the greater AUMF theater of conflict.[149] U.S. officials have argued that the fight with AUMF enemies is global, not confined to the territory of one country.[150] In fact, most of the leadership and many of the fighters for the AUMF parties are located outside of Afghanistan and within Pakistan's borders.[151] Thus, while the United States may not assert an unconditional right to attack targets throughout Pakistan at will, if Pakistan's territory is being used to continue the war against the

147. *See, e.g.*, Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan 2004-2009*, *in* SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt ed., forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144.

148. *The Truth about Talibanistan*, TIME.COM (Mar. 22, 2007), http://www.time.com/time/magazine/article/0,9171,1601850,00.html.

149. U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 1 (2006), *available at* www.fas.org/irp/nsa/doj011906.pdf [hereinafter NSA Report].

150. *See, e.g.*, *id.* at 5.

151. Joby Warrick, *U.S. Cites Big Gains Against Al-Qaeda*, WASH. POST, May 30, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/05/29/AR2008052904116_2.html?sid=ST2008053100213.

United States and its allies, and if Pakistan is unwilling or unable to contain the threat, then strikes on targets in Pakistan do not violate Pakistan's right to territorial inviolability. The argument that a conflict with a non-state actor must be confined to a geographical boundary may seem appealing to some, but it is not supported by law or custom and it becomes dangerously illogical when applied to conflicts that by their nature cross borders and by definition are not between or among territorially limited states.

That being said, and as noted above, deciding "whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to... the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses."[152] Thus, in response to the remaining two questions, obtaining a state's consent to use force within its territory may be required under the UN Charter,[153] but if a state is unable or unwilling to suppress a threat against the security of a second or third state (in this case, Afghanistan or the United States), that second or third state may exercise its Charter right to self defense.[154] According to public reports, U.S. officials have regularly consulted Pakistani authorities when drones have been employed for strike operations in Pakistan.[155] However, as Pakistan maintains only limited control over large swaths of its territory – and terrorists have used that ungoverned space to their advantage – both candidate[156] and President Obama[157] has made clear that the United States will act if and when Pakistan cannot.

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152. Koh, *supra* note 1.

153. U.N. Charter art. 2, para. 4, *available at* http://www.un.org/en/documents/charter/chapter1.shtml [hereinafter UN Charter]. Article 2(4) of the Charter of the United Nations provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." *Id.; see also*, Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, art. 1, Oct. 18, 1907, 36 Stat. 2310, 205 Consol. T.S. 299 [hereinafter Hague V].

154. *See* UN Charter, *supra* note 153, art. 51. *See also* Koh, *supra* note 1; U.S. Navy, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M, 7.3 (2007)

> A neutral nation has the duty to prevent the use of its territory as a place of sanctuary or a base of operations by belligerent forces of any side. If the neutral nation is unable or unwilling to enforce effectively its right of inviolability, an aggrieved belligerent may take such acts as are necessary in the neutral territory to counter the activities of enemy forces, including warships and military aircraft, making unlawful use of that territory.

155. *See, e.g.*, Amanda Hodge, *Pakistan Allowing CIA to Use Airbase For Drone Strikes,* THE AUSTRALIAN, Feb. 19, 2009, *available at* http://www.theaustralian.com.au/news/pakistan-permits-cia-base-for-strikes/story-e6frg6t6-1111118893683.

156. *See e.g.*, Steve Holland, *Tough Talk on Pakistan from Obama*, REUTERS, Aug. 1, 2007, *available at* http://www.reuters.com/article/idUSN0132206420070801.

157. *See, e.g.*, R. Jeffrey Smith, Candace Rondeaux & Joby Warrick, *2 U.S. Airstrikes Offer a Concrete Sign of Obama's Pakistan Policy*, WASH. POST, Jan. 24, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/01/23/AR2009012304189.html; James Joyner, *Obama Orders Pakistan Drone Strikes*, NEW ATLANTICIST, Jan. 24, 2009, *available at* http://www.acus.org/new_atlanticist/obama-orders-pakistan-drone-attacks.

While the AUMF conflict is fought primarily in Afghanistan with the consent of the Afghan government, and in Pakistan in consultation with the Pakistani government, the AUMF contemplates a transnational, borderless war with al Qaeda and associated forces. As al Qaeda maintains a strong presence in a number of countries, most notably Yemen and Somalia, and uses such states to train for, plan, and stage attacks against the United States and its allies, the United States has reportedly conducted limited kinetic operations in such countries.[158] Somalia and Yemen present an even more compelling case of "unwilling or unable" than Pakistan, as both states show little semblance of governance or law and order.[159] Accordingly, the United States would likely assert the right of self-defense as the legal rationale for drone strikes against al Qaeda and their associates in these and potentially other failed or failing states. More challenging is whether the United States would opt for attacking high-level targets in neutral states that *do* have the capacity and/or willingness to act, such as Kenya, the Philippines, or Saudi Arabia. Given the likely diplomatic repercussions, it is doubtful that U.S. officials would opt for a drone strike in such countries without consent at the highest levels of their governments. And if consent were given and U.S. personnel pulled the trigger on a targeting operation against AUMF foes, the strike would arguably be covered under AUMF authority and fall within the law of armed conflict. It bears noting that to the extent that belligerents are present in the "global commons," such as international waters, they are targetable there.[160] However, strike operations conducted in or from neutral waters or airspace fall under the same rules for strike operations in or from neutral territory.[161]

Thus, location matters, but it is not overly prohibitive. The United States has consistently made the case that the war with al Qaeda and its terrorist associates is of global reach.[162] The epicenter is in Afghanistan (and to a lesser extent Iraq), but al Qaeda, as a transnational non-state actor, operates in and wages war from states across the world. Particularly hot are the conflicts in Pakistan, Somalia, and Yemen, although al Qaeda's presence in other countries, including in Europe, has

158. *See Rise of Drones II*, *supra* note 40 (O'Connell describes a situation in November, 2002, where the U.S. used a drone outside a combat area "to fire laser-guided Hellfire missiles at a passenger vehicle traveling in a thinly populated region of Yemen." The drone was operated by CIA agents based in Djibouti).

159. *See, e.g.*, U.N. S.C. Rep. of the Secretary-General 8, U.N. Doc. S/2010/394 (July 26, 2010); Jeffrey D. Feltman, Assistant Secretary, Bureau of Near Eastern Affairs, House Committee on Foreign Affairs, Yemen on the Brink: Implications for U.S. Policy (Feb. 3, 2010), available at http://www.state.gov/p/nea/rls/rm/136499.htm.

160. United Nations Convention on the Law of the Sea arts. 19, 301, Dec. 10, 1982, 1833 U.N.T.S 397. Neutral zones, including the high seas and the air above the high seas, are reserved for "peaceful purposes," precluding their use to conduct lethal strike operations. *Id.* art. 88. However, in times of war, the law of armed conflict allows for the sea to be used for self-defense or other UN Charter-authorized uses of force. *See* George K. Walker, *Self-Defense, the Law of Armed Conflict and Port Security*, 5 S.C.J. INT'L L. & BUS. 347 (2009).

161. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA §1 (Louise Doswald-Beck ed., 1995), *available at* http://www.icrc.org/ihl.nsf/WebART/560-06?Open Document.

162. NSA Report, *supra* note 149.

led to a number of deadly attacks.[163] While the United States has not and will not respond to every terrorist threat posed by AUMF parties with military force, it has asserted the right to do so – with the consent or cooperation of the home government, or, if the home government is unwilling or unable to respond, without it.[164]

B. Location of the Operator

One of the most common critiques of drone warfare relates to the location of the operator. When it became apparent that most of the Predator strikes on al Qaeda targets were controlled far from the battlefield, in Nevada or at Langley or any other number of locations outside the traditional battlefield and out of harm's way, concerns with operators becoming detached and indifferent to the human costs began to emerge. While drones eliminate many of the issues associated with human emotion and frailty, leading to increased effectiveness and precision, some fear that advanced technologies may "make some soldiers too calm, too unaffected by killing."[165] Army chaplain D. Keith Shurtleff comments that "as wars become safer and easier, as soldiers are removed from the horrors of war and see the enemy not as humans but as blips on a screen, there is a very real danger of losing the deterrent that such horrors provide."[166] A number of operators and commentators have compared the drone operating experience to playing a video game,[167] with some commenting that a person playing a video game is usually "not a benevolent God."[168] While many of these issues are not unique to drones, drone warfare seems to present a number of particularly challenging ethical and moral questions.[169]

However, while further ethical or moral exploration may be required with regard to remotely conducted attacks performed far from the battlefield, the law of armed conflict does not present any additional limitations or prohibitions in this respect. There is no difference under the law of war if a ship at sea fires a rocket at a military objective hundreds or thousands of miles away ashore, or if a plane flying thousands of feet in the air bombs a military target it never sees, or if a domestic missile installation fires an intercontinental ballistic missile at a lawful target half way across the globe, so long as the attacks are carried out within the

163. *See* Alston, *supra* note 6, at 7-8; Robert S. Leiken & Steven Brooke, *Al Qaeda's Second Front: Europe*, N.Y. Times, July 15, 2005, *available at* http://www.nytimes.com /2005/07/14/opinion/14iht-edleiken.html.

164. Memorandum from John Yoo, Deputy Assistant Attorney General, The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sep. 25, 2001).

165. Singer, *supra* note 14, at 395.

166. *Id.* at 396.

167. *See, e.g.*, Eric Hagerman, *Point. Click. Kill: Inside The Air Force's Frantic Unmanned Reinvention*, POPULAR SCIENCE MAGAZINE, Aug. 18, 2009, *available at* http://www.popsci. com/drones.

168. Singer, *supra* note 14, at 395.

169. *See, e.g.*, Mat Trachok, *Predator Strikes Raise Novel Moral, Legal Issues*, HARVARD NATIONAL SECURITY JOURNAL, Dec. 2, 2009 *available at* http://www.harvardnsj.com/2009/12/ predator-strikes-raise-novel-moral-legal-issues/.

rules of armed conflict.[170] Similarly, the law of armed conflict does not forbid a military operator from remotely conducting a drone strike from an air force base in Nevada or some other location far from the target, if the strike is carried out within the same recognized conventional and customary legal framework that any other attack in the same armed conflict would be performed. In sum, the location of the operator in the context of an armed conflict does not make a legal difference as long as that operator is working under the same rules as any other individual engaged in the conflict.

C. Status of the Operator

Probably the most controversial aspect of the drone strike program is the status of the operator. Even some of those who are fully on board with nearly every other aspect of drone warfare find themselves uneasy with civilian personnel performing a combat function.[171] In the broader AUMF conflict, it is reportedly the CIA that almost exclusively operates drones for lethal strike operations.[172] The United States has relied heavily on the CIA to perform combat-type functions in its current conflicts.[173] Proponents would likely argue that this is because the current conflicts are unlike any others the United States has found itself in – with a greater need for quick, actionable intelligence, targeting identification and acquisition, secrecy, and swift decision-making.[174] To be sure, not many would argue that the CIA may not perform a prominent intelligence role in the current armed conflicts, even by using drones for reconnaissance and espionage missions. But CIA operation of drones for lethal combat-type operations prompts a number of legal questions.

As discussed at length in section III(B)(1) above, only lawful combatants (or privileged belligerents) are permitted to participate in hostilities.[175] The CIA is a civilian agency and not a branch of the U.S. Armed Forces. Even under a liberal reading of Article 4 from GC III, the CIA would not meet the requirements of lawful belligerency as a militia or volunteer corps because, while they do report to a responsible chain of command (albeit not always a military chain of command), as a group they do not wear uniforms or otherwise distinguish themselves, nor do they carry their arms openly. CIA personnel are therefore unprivileged

170. It should be noted here that the same rules regarding neutral zones described in the "location of the strike" section above apply equally here to the location of the operator. *See supra* Section IV(A).

171. *See, e.g.*, Kenneth Anderson, *Predators Over Pakistan*, 15 WEEKLY STANDARD 24, Mar. 8, 2010, *available at* http://www.weeklystandard.com/articles/predators-over-pakistan; David Glazier, *Testimony Before the House Subcommittee on National Security and Foreign Affairs*, U.S. House of Representatives Committee on Oversight and Government Reform, Apr. 28, 2010 *available at* http://oversight.house.gov/images/stories/subcommittees/NS_Subcommittee/4.28.10_Drones_II/Glazier_Statement.pdf.

172. *See* Jane Mayer, *The Predator War: What are the risks of the C.I.A.'s covert drone program*, NEW YORKER, Oct. 26, 2009, *available at* http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer.

173. *Id.*

174. *Id.*

175. *See* Baxter, *supra* note 92; GOLDMAN & TITTEMORE, *supra* note 51, at 2-4.

belligerents[176] in this conflict.[177] This may not prohibit the United States from using CIA or other civilian personnel to conduct drone strikes, but the participating civilians join the fight without the combatant's privilege and lose their protected civilian status.[178] While engaged CIA personnel become targetable as combatants, it is unclear whether CIA personnel would also be prosecutable as unlawful belligerents for their participation in the hostilities.[179] Some have questioned whether requiring a uniformed service-member to "pull the trigger" in a "right seat-left seat" situation with the CIA might solve this issue. After all, reconnaissance, target identification, and remote piloting do not by themselves constitute acts of belligerency. However, applying the direct participation analysis, CIA personnel involved in preparing for, assisting, and setting up hostile acts perform a combat function, have likely already given up their civilian protected status, and do not need to actually pull the trigger in order to cross the line into a combatant role.

There is some speculation that the CIA only conducts drone attacks outside "traditional battlefields," leaving Afghan and Iraqi operations to the military. Jane Mayer writes: "The U.S. government runs two drone programs. The military's

176. *But see* ICRC DPH Guidance, *supra* note 96, at 39 (stating even the ICRC allows some civilians, if incorporated into the forces, may take on a combatant status in certain situations:

> As long as they are not incorporated into the armed forces, private contractors and civilian employees do not cease to be civilians simply because they accompany the armed forces and or assume functions other than the conduct of hostilities that would traditionally have been performed by military personnel. . . . A different conclusion must be reached for contractors and employees who, to all intents and purposes, have been incorporated into the armed forces of a party to the conflict, whether through a formal procedure under national law or *de facto* by being given a continuous combat function. Under IHL, such personnel would become members of an organized armed force, group, or unit under a command responsible to a party to the conflict and, for the purposes of the principle of distinction, would no longer qualify as civilians.

177. Gary Solis argues exactly this point in a recent Washington Post editorial. *See* Gary Solis, *CIA Drone Attacks Produce America's Own Unlawful Combatants*, WASH. POST, Mar. 12, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/03/11/AR2010031103653.html.

178. *Id.* (asserting that CIA personnel, as unlawful combatants, might be targetable as a class anywhere by current enemies—even driving to work at Langley).

179. It can be argued that the United States takes the position that unprivileged belligerency is a violation of the law of war. As an example, the Military Commissions Act of 2009 criminalizes activities committed by unprivileged belligerents (*i.e.*, conspiracy, material support, and murder in violation of the law of war) that would not be war crimes if committed by lawful combatants committed during the course of an international armed conflict. However, this is controversial. The ICRC DPH Guidance asserts that:

> The absence in IHL of an express right for civilians to directly participate in hostilities does not necessarily imply an international prohibition of such participation. Indeed, as such, civilian direct participation in hostilities is neither prohibited by IHL nor criminalized under the statutes of any prior or current international criminal tribunal or court.

The ICRC notes, though, that such civilians may "not enjoy immunity from domestic prosecution for lawful acts of war, that is, for having directly participated in hostilities while respecting IHL." ICRC DPH Guidance, *supra* note 96, at 83-84.

version, which is publicly acknowledged, operates in the recognized war zones of Afghanistan and Iraq, and targets enemies of U.S. troops stationed there. As such, it is an extension of conventional warfare. The C.I.A.'s program is aimed at terror suspects around the world, including in countries where U.S. troops are not based."[180] This may reflect a political or diplomatic decision not to introduce military elements into countries where the United States does not maintain an active military presence. However, some suggest that the CIA's role in the recognized war zones might be greater than Mayer's assessment.[181] Either way, because the United States treats the AUMF conflict as an armed conflict that extends beyond Afghanistan and Iraq, the CIA participates within the framework of that armed conflict whenever they target AUMF enemies.

A number of critics also point to the lack of accountability for CIA drone strikes as reason for concern. O'Connell, for example, claims that CIA personnel are not trained in the laws of war and do not take into account the constraints imposed by that legal framework when conducting strike operations.[182] The military, in contrast, is trained in the laws of war and expected to comply with them, perform all operations under a strict command structure, and are held accountable for their actions under the Uniform Code for Military Justice. In addition, the military is subject to its own internal rules and regulations as well as the guidance from its commanders that further restrain its personnel.[183] Of course, this is not to say that the CIA does not require its personnel to abide by many of the same rules with equal rigor and accountability—they certainly may. But the public does not know what rules apply and neither does the enemy, in contrast to the military's requirement for transparency in promulgating its rules and regulations.

Finally, in addition to the civilian-military status issue, there is an obscure but emerging computer-human status issue in this area. Verging on the stuff of science fiction, "autonomous UAVs" may become a reality in the near future. Singer writes,

> As military robots gain more and more autonomy... [a]utonomous robots could, in theory, follow the rules of engagement; they could be programmed with a list of criteria for determining appropriate targets and when shooting is permissible. The robot might be programmed to require human input if any civilians were detected. An example of such a list at work might go as follows: "Is the target a Soviet-made T-80 tank? Identification confirmed. Is the target located in an authorized

180. Mayer, *supra* note 172.

181. *See e.g.*, *Rise in Drones II*, *supra* note 40, at 6 (recounting an interview with a former drone commander from Nellis Air Force Base in Nevada, where the commander admitted that all Air Force drone operations were conducted jointly – or with CIA participation).

182. *Id.* at 8.

183. *See* FM 3-24, *supra* note 121; FM 27-10, *supra* note 67; *also consider* General Stanley McChrystal's "zero-tolerance" policy on civilian deaths in Afghanistan. *See McChrystal Apologizes as Airstrike Kills Dozens in Afghanistan*, CNN.COM, Feb. 23, 2010, *available at* http://www.cnn.com/2010/ WORLD/asiapcf/02/22/afghanistan.civilian.strike/index.html.

> free-fire zone? Location confirmed. Are there any friendly units within a 200-meter radius? No friendlies detected. Are there any civilians within a 200-meter radius? No civilians detected. Weapons release authorized. No human command authority required."[184]

Such a prospect presents serious challenges to the law of war framework. For one, having a human responsible for his or her actions serves as a deterrent to violations of the law.[185] Allowing a computer to "make" life or death decisions severs this chain of responsibility. Second, robots do not meet the definition of lawful combatants and may not participate independently in combat operations.[186] And third, while humans may commit errors due to emotion, fatigue, or other factors, human judgment is often critical in exercising restraint in armed conflict. Taking Singer's scenario as an example, it is hard to imagine how a drone might be programmed to account for distinction when the enemy's status is inherently unclear, or for proportionality when the situation calls for a difficult decision on calculating the worth of human life, or for humanity when the strike might not be worth the human costs. Humans are required by the law of armed conflict to exercise judgment and restraint, and programming into a drone the standard rules of engagement is a start, but human judgment ultimately requires human operators.

V. CONCLUSION: DOES THE LAW OF ARMED CONFLICT PROVIDE ADEQUATE RULES TO GOVERN DRONE WARFARE?

As this analysis has demonstrated, there are more than enough rules for governing drone warfare – from the laws governing aerial and missile warfare to the fundamental principles of the law of armed conflict, to specialized weapons treaties and the Hague and Geneva conventions, and from customary law to the UN Charter. The issue is whether these rules are fairly and consistently followed. Correctly, the Obama Administration has stated that "the rules that govern targeting do not turn on the type of weapon system used, and there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict—such as pilotless aircraft or so-called smart bombs—so long as they are employed in conformity with applicable laws of war."[187] Drones may present interesting new challenges because of their sophistication and the technological advantage they convey to their operators, but the law of armed conflict is more than adequate to govern their wartime deployment. The United States has stated that it is committed to ensuring that targeting practices are lawful.[188] To this end, the Administration has "carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles," concluding that "targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war."[189] In sum, properly

184. *Military Robots and the Laws of War*, *supra* note 16.
185. *Id.*
186. *Id.*
187. Koh, *supra* note 1.
188. *Id.*
189. *Id.*

conducted drone attacks, which take into account all the constraining principles from the law of war, target lawful objectives, and are performed by privileged belligerents, do not violate the law of armed conflict.

Drawn from the above analysis, then, I close by offering ten guiding principles for conducting drone strikes within the letter and spirit of the law of war:

One: Any drone strike *must* be necessary for the accomplishment of an actual military objective.

Two: A drone strike *must* be directed only at lawful targets—i.e., combatants, civilians who have forfeited their protections by directly participating in hostilities, and military objectives.

Three: Commanders and operators *must* not authorize a drone strike when they know or reasonably should know that the strike will cause excessive collateral effects to civilians or civilian property.

Four: Commanders and operators *must* strike a proportional balance between the risk to civilians or civilian objects and the military advantage expected when using drones to conduct attacks.

Five: Commanders and operators *must* exercise constant care and reasonable precaution to spare the civilian population from death and destruction.

Six: Commanders and operators *must* not conduct drone strikes where there is a high likelihood that the strike will cause unnecessary suffering or superfluous injury.

Seven: A drone strike *must* be conducted within the framework of an actual armed conflict.

Eight: A drone strike *should* be conducted only by lawful combatants.

Nine: Commanders and operators *should* receive prior consent (even if blanket approval) from the state in whose territory the strike will occur, unless that state is unwilling or unable to control the threatening activities within its own territory.

Ten: Although not required by law, commanders and operators may benefit in certain circumstances from pursuing a non-lethal course of action if a target might just as easily be captured and detained, within reason and subject to force protection concerns.

ETHIOPIA'S ARMED INTERVENTION IN SOMALIA: THE LEGALITY OF SELF-DEFENSE IN RESPONSE TO THE THREAT OF TERRORISM

AWOL K. ALLO*

Whereas there are debates among some academic circles that the events of 9/11 have constituted a change in the law of self-defense, this article argues against the possibility, even of the desirability, of such an assertion. By situating the law of self-defense in the context of 'terrorism' and the threat thereof, this article argues that Ethiopia's claim for a lawful exercise of its right to self-defense falls short of the requirements of the law even if Ethiopia was neither questioned nor condemned by the United Nations Security Council or the African Union.

I. INTRODUCTION

"The Ethiopian government has taken self-defensive measures and started counterattacking the aggressive forces of the Islamic Courts and foreign terrorist groups"[1]—was how the Ethiopian Prime Minister declared the official start of the war between Ethiopia and the Union of Islamic Courts (hereinafter the UIC) on the night of December 24, 2006. In this sentence, the Prime Minister singled out two of the four grounds Ethiopia presented as justifying its inherent right to individual and collective self-defense—aggression and the threat of terrorism.[2]

Against the backdrop of evolving debates on the adequacy of the rules of international law governing the use of force and self-defense, this article seeks to enquire whether these changes represent a change in the law culminating from the necessary state practice and *opinion juris* or simply a change in the fact that does not constitute a new rule of self-defense.

Drawing on governmental statements, policy papers, official correspondences, and newspaper articles for facts and allegations, this article strives to make a

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1. Emmanuel Fanta, *Analysis: Ethiopian Intervention in Somalia in Context*, BLOGGER NEWS NETWORK (Jan. 30, 2007), http://www.bloggernews.net/14238.

2. Ethiopia argued that four factors—a) the destabilizing mission of the Eritrean government from the north, b) the declaration of *jihad* by UIC against Ethiopia, c) the presence in Somalia of Ethiopian insurgents which seek to overthrow the government of Ethiopia by force; and d) The presence and continued influx of foreign terrorist groups with the view to advancing the extremist agenda of the UIC—created a state of "clear and present danger" triggering its lawful right to self-defense under international law. *See infra* note 142.

conceptual analysis of whether the facts on the ground met the standards of the UN Charter or customary international law when Ethiopia triggered its right to self-defense. Apart from self-defense, Ethiopia claimed that its intervention is allowed by the invitation of the "internationally recognized government of Somalia."[3] This author has examined the validity of Ethiopia's claim to lawful invitation somewhere else. This article examines the consistency of Ethiopia's claim to the exercise of its "individual and collective self-defense" with contemporary norms of international law governing the use of force. Within that frame, the article seeks to reflect on the failed state scenario of Somalia and the silence of the international community (UN, AU, EU, individual states) in the face of Ethiopia's intervention and what that silence says about Ethiopia's action in particular and the evolution of the law of self-defense in general.

II. ETHIOPIA'S MILITARY INTERVENTION IN SOMALIA: COLLECTIVE SELF-DEFENSE

The United Nations Charter outlaws all aspects of coercive use of force between sovereign nations while delineating a carefully crafted exception consistent with its prime purpose of maintaining international peace and security.[4] Most experts on the use of force agree on the Charter's two known exceptions to the general prohibition set forth under Article 2(4).[5] While the first of these exceptions pertains to the right of "individual and collective self-defen[s]e" enunciated under Article 51 of the Charter[6], the second exception relates to the use of force by the Security Council in response to a "threat to the peace, breach of the peace, or an act of aggression" under Chapter VII of the Charter.[7]

Ethiopia justified its military intervention in Somalia as a lawful exercise of its "inherent right of individual or collective self-defen[s]e" embodied under Article 51 of the UN Charter.[8] Article 51 of the Charter in part reads: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defen[s]e if an armed attack occurs against a Member of the United Nations, until

3. *See* Awol Kassim Allo, *Counter-Intervention, Invitation, Both or Neither? An Appraisal of the 2006 Ethiopian Military Intervention in Somalia*, 3 MIZAN L. REV. 201, 214 (2009) (discussing the legality of Ethiopia's claim to lawful invitation).

4. *See* U.N. Charter pmbl., art. 1, 2.

5. *See* STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 43-44 (1996); CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 59-60 (2d ed. 2004); HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT *30-35* (1992); MARY ELLEN O'CONNELL, THE MYTH OF PREEMPTIVE SELF-DEFENSE 3 (Am. Soc'y of Int'l Law Task Force on Terrorism 2002), *available at* http://www.asil.org/taskforce/oconnell.pdf; MALCOLM N. SHAW, INTERNATIONAL LAW 1123 (6th ed. 2008); THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 9-10 (A. Cassese ed., 1986).

6. U.N. Charter art. 51.

7. U.N. Charter art. 39; *see also* U.N. Charter art. 2, para. 4, arts. 40 – 42, 51; IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 275-78 (1963); O'CONNELL, *supra* note 5 at 3-4.

8. U.N. Charter art. 51; *see also* U.N. Sec. Council Comm., *Rep. of the Monitoring Group on Somalia pursuant to Sec. Council resolution 1724*, ¶ 29, U.N. Doc. S/2007/436 (June 27, 2006).

the Security Council has taken measures necessary to maintain international peace and security."[9]

The reference to the term "inherent" is said to have reaffirmed the natural right of a State under customary international law to defend itself from an armed attack[10] through the use of force. However, although collective self-defense was not understood to be as "inherent" as a matter of international law at the time the UN Charter was adopted, the International Court of Justice (ICJ or the Court) in *Nicaragua* reaffirmed the "inherent" nature of both variants of self-defense—the right to individual and collective self-defense.[11] In relevant part, the Court stated, "the language of Article 51 of the United Nations Charter, the inherent right ("droit naturel") which any State possesses in the event of an armed attack, covers both collective and individual self-defen[s]e."[12]

Following the adoption of the Charter, many States resorted to international and regional security schemes under a covenant and accordingly agreed to regard an attack against one as an attack against all.[13] In *Nicaragua*, the ICJ set forth the cardinal rule for the exercise of the right to collective self-defense in the absence of a prior treaty agreement.[14] Denying the contention of the United States for the existence of a lawful ground for collective self-defense, the Court outlined the essential requirements for the exercise of lawful collective self-defense under the Charter and customary international law.[15] In order for collective self-defense to be valid under international law, the Court held that there should be a declaration by the victim state "which must form and declare the view that it has been so attacked,"[16] followed by a subsequent request by that "victim of an armed attack"[17] to another State for help.

According to the judgment in *Nicaragua*, the Court further emphasized the existence of the requirement of an armed attack against the victim State. These requirements are similar to those needed for individual self-defense when a third State exercises a collective right to self-defense on behalf of the victim State. The Court made the observation that:

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9. U.N. Charter art. 51.

10. Legal Consequences of the Construction of A Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I. C. J 136, 139 (July 9) [hereinafter *Palestinian Territory*].

11. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 193 (June 27) [hereinafter *Nicaragua*]; *See also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 244, ¶¶ 38-39, 96-97 (July 8 [hereinafter *Nuclear Weapons*].

12. *Nicaragua*, 1986 I.C.J. at 102, ¶ 193.

13. *See* Treaty of Friendship, Co-operation and Mutual Assistance, art. 4, May 14, 1955, 219 U.N.T.S. 3; Charter of the Organization of the American States, art. 5(f), Apr. 30, 1948, 2 I.L.M. 235, 119 U.N.T.S. 3; Inter-American Treaty of Reciprocal Assistance and Final Act of the Inter-American Conference for the Maintenance of Continental Peace and Security, Sept. 2, 1947, Art. 3(1), 4 U.S.T. 559, 21 U.N.T.S. 77; SHAW, *supra* note 5, at 1290, 1137.

14. *Nicaragua*, 1986 I.C.J at 103-05, ¶¶ 193-99.

15. *Id.*

16. *Id.* ¶ 195.

17. *Id.* ¶ 199.

> Thus, the lawfulness of the use of force by a State in response to a wrongful act of which it has not itself been the victim is not admitted when this wrongful act is not an armed attack. In the view of the Court, under international law in force today - whether customary international law or that of the United Nations system - States do not have a right of 'collective' armed response to acts which do not constitute an 'armed attack.'[18]

Ethiopia and Somalia were not parties to any prior bilateral or multilateral treaty arrangements that called for a collective security scheme comparable to those of NATO, the now defunct Warsaw Pact, or Inter-American Pacts governing collective self-defense arrangements examined in *Nicaragua.*[19] For the same reason, Ethiopia cannot justify an attack against Somalia's Transitional Federal Government (hereinafter the TFG) through a collective right to self-defense as an attack against itself to resort to the use of force against other forces within Somalia in the absence of a prior treaty arrangement. Further, even if such a treaty arrangement existed, Ethiopia could not have acted in lawful collective self-defense against the Islamic Courts in a manner consistent with the UN Charter insofar as attacks emanating from within Somalia are concerned. Such conduct would constitute an intervention into the domestic affairs of the State and does not seem to be consistent with the stipulation of the Charter.[20] If Somalia had been under an "armed attack" from another sovereign State, declared that it was a subject of an armed attack, and accordingly solicited Ethiopia's assistance, Ethiopia could have lawfully acted pursuant to the request, in light of the Court's guidance in *Nicaragua.*[21] However, although other States provided military and other assistance to the UIC,[22] which could have probably amounted to intervention under Article 2(7) of the Charter, such conduct cannot, of itself, justify a self-defensive response since such assistance does not constitute an "armed attack" by the other assisting States. As the ICJ reiterated in *Nicaragua*, assistance to rebel groups does not constitute an "armed attack" by the State from which the rebel

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18. *Id.* ¶ 211.

19. Evidently, Somalia and Ethiopia were in a fathom of political and military confrontation until the Seiad Barre regime collapsed, let alone have a NATO or Warsaw style pact. Since 1991 leading to the recent impasse, Somalia never had any *de facto* or *de jure* regime that do the same. Robert I. Rotberg, *Failed States in a World of Terror*, 81 FOREIGN AFF. 127, 128 (2002).

20. *See* U.N. Charter art. 2, para. 7; Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/RES/2625(XXV) (Oct. 24, 1970) [hereinafter *Declaration on Principles of International Law*].

21. *Nicaragua*, 1986 I.C.J. at 203-05, ¶¶ 195-99 ("[The Court] concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked.").

22. *See* U.N. Sec. Council Comm., *Rep. of the Monitoring Group on Somalia established pursuant to Sec. Council resolution 751 (1992)*, ¶ 159, U.N. Doc S/2006/229 (May 4, 2006); U.N. Sec. Council Comm., *Rep. of the Monitoring Group on Somalia established pursuant to Sec. Council resolution 1587 (2005)*, ¶¶ 8, 25, U.N. Doc. S/2005/625 (Oct. 4, 2005).

groups received support or the State whose territory the rebels used, and hence, cannot justify collective self-defense under Article 51 of the Charter.[23]

Following the attack on 9/11, NATO did not require the involvement of a State to justify its collective-self-defense in Afghanistan. Rather it agreed that "if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty."[24] The extent of the legality of NATO's action is subject to the Washington Treaty.[25] Further, the right to self-defensive measures by the victim State of 9/11 was affirmed by the UN Security Council.[26] There are three reasons which provided the gloss of legality to NATO's intervention in Afghanistan, all of which are not present in Ethiopia's case. Firstly, the Washington Treaty governed the condition for NATO's intervention while there is no such treaty between Ethiopia and Somalia. Secondly, there is a Security Council authorization in the case of the Afghan intervention while there is none in Ethiopia's case. Finally, the attack against the Somali government comes from within Somalia itself, not "directed" from abroad as is the case with NATO's intervention, weakening Ethiopia's case for collective self-defense.

Writing on the controversial right to pre-emptive self-defense in the wake of 9/11, Professor Mary Ellen O'Connell makes a compelling appraisal of the ICJ decision in *Nicaragua*.[27] Relying on the ICJ's pronouncement that the supply of weapons by Nicaragua to El Salvadoran rebels did not amount to an armed attack, Professor O'Connell insists on seeking the authorization of the Security Council to lawfully exercise the right to collective self-defense if pressing concerns exist which do not fit into the parameters of the law.[28] Although the Security Council had considered the military standoff between the various forces within and neighboring Somalia, as well as Ethiopia's allegation of the mounting threat to its security and territorial integrity, the Council did not authorize Ethiopia to take self-defensive measures.[29] Indeed, in Resolution 1725 adopted eighteen days before the culmination of the hostility into a full-scale war, the Council expressly endorsed a proposal by the Inter-Governmental Authority for Development (IGAD) to exclude neighboring States of Somalia from the protection and training mission for Somalia.[30] In the Resolution, the Council implied the existence of States with a vested interest when it called upon "all parties inside Somalia and all other States

23. *See Nicaragua*, 1986 I.C.J. at 203, ¶ 195.

24. Press Release, NATO, Statement by the North Atlantic Council, NATO Press Release (2001) 124 (Sept. 12, 2001), *available* at http://www.nato.int/docu/pr/2001/p01-124e.htm.

25. Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L.J. 41, 48 (2002).

26. *See id.*

27. *See* O'CONNELL, *supra* note 5, at 6.

28. *Id.*

29. The Security Council has not made any statement that has the effect of either implicitly or explicitly authorizing Ethiopia to use force in Somalia. Rather, in Resolution 1725/2006, the Council asked neighboring States to exercise restraint. S.C. Res. 1725, ¶ 1-3, U.N. Doc. S/RES/1725 (Dec. 6, 2006).

30. *Id.* ¶ 3.

to refrain from action that could provoke or perpetuate violence and violations of human rights, contribute to unnecessary tension and mistrust, endanger the ceasefire and political process, or further damage the humanitarian situation."[31] Under these circumstances, there is no doubt that Eritrea and Ethiopia are among the States that the Resolution called upon to refrain from actions that "perpetuate violence" and derail the political process in an already turbulent State.[32] Thus, Ethiopia's claim to collective self-defense of Somalia under Article 51 of the Charter does not seem to be compatible with the stipulation of the Charter.

III. ETHIOPIA'S ARMED INTERVENTION IN SOMALIA: "INDIVIDUAL SELF-DEFENSE?"

The exercise of the right to individual self-defense under Article 51 of the Charter requires the fulfillment of several rigorous but exceedingly subjective criteria. A lawful resort to armed force by individual States under Article 51 requires the fulfillment of at least the following conditions: a) there has to be a *significant* armed attack against the State acting in self-defense;[33] b) the self-defensive measure must be against a State and aimed at the attacking party;[34] c) the measure must respect the principles of necessity;[35] and d) the response must be equivalent to the attack—the principle of proportionality must be observed.[36]

As the nature of global conflicts change, new actors emerge, and new threats proliferate, these requirements have continued to generate deeper controversies between States, legal practitioners, and academics leading to a sustained call for the redefinition of the rules to meet contemporary threats.[37] Nevertheless, the debate over the precise contents of the vernaculars of U.N. Charter Article 51 continued between the strict constructionists on the one hand and those who envision a broader scope of interpretation and application on the other.[38] The most vociferous of these debates include such questions as: what constitutes an "armed attack?" When is an armed attack said to have occurred? When is an armed response necessary? What is a proportionate response to threats or attacks under the circumstances? Since Ethiopia strenuously justified its military interventions in

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31. *Id.* at pmbl.

32. *Id.*

33. *Nicaragua*, 1986 I.C.J. at 203, ¶ 195 (holding that a "mere frontier incident" does not amount to an armed attack for the purpose of self-defense under Article 51).

34. *Id.*

35. *See Nuclear Weapons*, 1996 I.C.J. at 245, ¶ 41; *Nicaragua*, 1986 I.C.J. at 106-11, ¶¶ 201-212; O'CONNELL, *supra* note 5, at 7.

36. *See Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, [2001] 2 Y.B. Int'l L. Comm'n 20, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (part 2), *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf; O'CONNELL, *supra* note 5, at 7; Franck, *Terrorism and the Right of Self-Defense*, *infra* note 74, at 839; Judith Gail Gardam, *Proportionality and Force in International Law*, 87AM. J. INT'L L. 391, 391 (1993).

37. U.N. SCOR, 56th Sess., 4370th mtg. at 3-4, U.N. Doc. S/PV.4370 (Sept. 12, 2001) ("The magnitude of yesterday's acts goes beyond terrorism as we have known it so far. . . . We therefore think that new definitions, terms and strategies have to be developed for the new realities."); Erin L. Guruli, *The Terrorism Era: Should the International Community Redefine its Legal Standards on Use of Force in Self-Defense?*, 12 WILLAMETTE J. INT'L L. & DIS. RES. 100, 123.

38. *See infra* n. 44 & 45.

Somalia on the basis of its inherent right to individual self-defense under the Charter, an examination of the requirements of lawful individual self-defense under Article 51 of the Charter will follow.

A. The Requirement of an "Armed Attack"

The occurrence of an "armed attack" against the victim State in violation of the principles enunciated under Article 2(4) of the Charter constitutes the primary trigger for self-defense.[39] However, there are extensive debates as to the precise requirements of Article 51 with respect to the occurrence of an "armed attack." The question is not so much whether an armed attack has occurred, it is rather: when is an armed attack said to have occurred? For most strict constructionists, the cumulative reading of Article 2(4) and Article 51 constituted a rule that defined the scope and limits of the principle.[40] For them, self-defense is a response to an armed attack triggered only "if an armed attack occurs against a Member of the United Nations" and in no other circumstance.[41] In that sense, the question is the first, whether an armed attack has occurred. The literal reading of the semantics used in Article 51, "if an armed attack occurs," reinforces this view and seems to clearly require an actual "armed attack" against States.[42]

Other authorities consider the above construction as excessively restrictive and legalistic to the extreme and point to the opening sentence of Article 51 to defend their vision of a broader scope of the right to self-defense. They argue that the phrase "[n]othing in the present Charter shall impair the inherent right of . . . self-defen[s]e," recognizes the existence of a customary right to self-defense unencumbered by the narrower scope of the Charter which strictly requires the occurrence of an armed attack.[43] It is also submitted that the *travaux préparatoires* of the Charter supports the view that the "'use of arms in legitimate self-defen[s]e remains admitted and unimpaired.'"[44] Summarizing the views of "some States" and "most academics," Malcolm N. Shaw portrays "Article 51 as merely elaborating one kind of self-defense in the context of the primary responsibility of the Security Council" within the framework of the Charter.[45]

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39. O'CONNELL, *supra* note 5, at 5.

40. SHAW, *supra* note 5, at 1132.

41. U.N. Charter art. 2; *see* EDUARDO JIMÉNEZ DE ARÉCHAGA, INTERNATIONAL LAW IN THE PAST THIRD OF A CENTURY 87-98 (Recueil des Cours vol. I, 1978); BROWNLIE, *supra* note 7, at 112-13, 264; SHAW, *supra* note 5 at 1132-33.

42. *Palestinian Territory*, 2004 I.C.J at 194, ¶ 127; *Nicaragua*, 1986 I.C.J. at 203, ¶¶ 194-195; *see also* T. D. Gill, *Litigation Strategy in the Nicaraguan Case at the International Court*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY 197, 223 (Yoram Dinstein, ed. 1989).

43. *See* D. W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 185-86 (1958); J.L. BRIERLY, THE LAW OF NATIONS 417-18 (6th ed. 1963); D.P. O'CONNELL, INTERNATIONAL LAW 317 (1965); JULIUS STONE, AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION 43, 95-96 (1958); H. WALDOCK, GENERAL COURSE ON PUBLIC INTERNATIONAL LAW 6, 231-37 (1962).

44. *See* SHAW, *supra* note 5 at 1132 n.68 (quoting U.N. Conference of International Organization).

45. *Id.* at 1026.

Even more authoritative and reconciliatory of the above debate is the reaffirmation of the latter view by the ICJ in *Nicaragua.* In its extensive examination of the issue, the Court proclaimed the existence of a conventional and customary right to self-defense.[46] In dismissing the contention of the United States that Article 51 of the Charter "subsumes and supervenes" the scope of the right under customary international law, the Court construed the silence of Article 51 on certain essential rules of self-defense, well-established in customary international law, as evidencing the inadequacy of Article 51 to independently regulate the exercise of the right.[47] In affirming the existence of a customary rule of self-defense along side the Charter rule, the Court declared:

> It cannot therefore be held that Article 51 is a provision which 'subsumes and supervenes' customary international law. It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed, customary international law continues to exist alongside treaty law. The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content.[48]

In *Nicaragua,* although the Court found a customary right of self-defense governing situations slightly separate from the Charter, it did not go into detail on how and when States could resort to self-defense in cases of an "imminent threat of armed attack" short of actual armed attack.[49] It did, however, hold that the right to self-defense under Article 51 requires the occurrence of an armed attack when it held that "[i]n the case of individual self-defen[s]e, the exercise of this right is subject to the State concerned having been the victim of an armed attack."[50] Nevertheless, the Court clearly implied the availability of the right to self-defense in response to an imminent threat of an armed attack.[51] Therefore, while Article 51 of the Charter allows self-defense only in response to an armed attack, the inherent right of States to resort to force against an "imminent threat of attack" under customary law remained unencumbered by the Charter.

The Ethiopian government and opposition forces within Ethiopia are in agreement that there has been an attack against Ethiopia by Ethiopian rebel forces

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46. *Nicaragua*, 1986 I.C.J. at 94, ¶ 176.

47. *Id.* ("[T]he Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the "armed attack" which, if found to exist, authorizes the exercise of the "inherent right" of self-defense, is not provided in the Charter, and is not part of treaty law.").

48. *Id.*

49. *Id.* at 103, ¶ 194.

50. *Id.* at 103, ¶ 195; *See also id.* at 27-28, ¶ 35 ("[W]hat is in issue is the purported exercise by the United States of a right of collective self-defen[s]e in response to an armed attack on another State. The possible lawfulness of a response to the imminent threat of an armed attack which has not yet taken place has not been raised.").

51. *See id.*; *See also* Armed Activities on the Territory of the Congo (Dom. Rep. Congo v. Uganda) 2005 I.C.J. 168, ¶ 144 (Dec. 19) [hereinafter *Territory of the Congo*].

operating from the territories under the control of the UIC.[52] However, the mere existence of an attack does not necessarily constitute an "armed attack" triggering Ethiopia's right of self-defense under Article 51 of the Charter. Further, Somalia's failed State scenario makes it almost impossible to develop a proper allocation of responsibility for allowing territories under its control to be used by insurgents or for failing to control[53] the attacks emanating from within its territory. Theoretically, as a *de facto* regime, the UIC has the duty to refrain from acts contrary to the stipulation of Article 2(4) of the UN Charter.[54] But accountability for breach of international law by *de facto* regimes remained an elusive normative conception not yet crystallized into general international law. In the absence of a responsible government in effective control of the territory of the state, one can question the extent to which the State that continued to suffer cross-border skirmishes should exercise restraint. Nevertheless, the attack against Ethiopia by Ethiopian rebel forces from the areas under the control of the UIC does not justify Ethiopia's unilateral military operation in Somalia. Ethiopia's intervention is unjustified and inconsistent with the requirements of Article 51, not only because the attack has come from Ethiopian insurgents operating from within Somalia, but also because its actions contradicted Security Council resolution.

B. The Requirement of a "State Actor"

The second major requirement relates to the existence of a nexus between the armed attack and a State in order for an act to constitute an armed attack under Article 51 of the Charter.[55] Although there is nothing in the Charter or the language of Article 51 requiring a nexus between the "armed attack" and a State, traditional international law has tied the notion of armed attack in Article 51 to States.[56] This is partly because the prohibition set forth in Article 2(4) is stipulated as the duty of "all Members" to refrain in their international relations from actions which potentially trigger the application of Article 51.[57] The argument goes, if the prohibition is addressed to States, the right granted to the State as an exception to Article 2(4) must also be exercised against recalcitrant States that contradicted the prohibition under Article 2(4).[58]

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52. *See* Fanta, *supra* note 1.

53. *See Declaration on Principles of International Law*, *supra* note 20, at art. 3(g) ("The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."); G.A. Res. 3314, Annex Art. 3(g), U.N. Doc. A/RES/3314 (Nov. 29, 1974); *See also* O'CONNELL, *supra* note 5, at 7 (discussing that legal responsibility follows if a state controlled or supported the attackers).

54. *See* Carsten Stahn, *Terrorist Acts as "Armed Attacks": The Right to Self-Defense, Article 51 (1/212) of the UN Charter, and International Terrorism*, 27 FLETCHER F. WORLD AFF. 35, 42 (2003).

55. *See Nicaragua*, 1986 I.C.J. at 103-104, ¶ 195; Murphy, *supra* note 25, at 44.

56. *See* GRAY, *supra* note 5, at 6, 130 (arguing that, although the International Court of Justice required a nexus between the armed attack and the State in *Nicaragua*, most States did not claim a legal right to the use of force based on the narrow question of whether an attack constituted an armed attack).

57. U.N. Charter art. 2(4) (prohibiting "the threat or use of force against the territorial integrity or political independence of any state").

58. *See* O'CONNELL, *supra* note 5, at 4-5.

However, modern international life and the growing power of non-state-actors seem to have rendered the requirement of a nexus between a State and a non-state actor simply unrealistic. 9/11 sent a powerful message to the world that organized non-state actors/terrorists could fly commercial airplanes into skyscrapers to rein shock and panic in one of the most powerful nations on earth without employing conventional firearms.[59] Following that incident, the international community came to recognize that a private act could constitute an "armed attack" within the provision of Article 51 regardless of a nexus between a State and a need for attribution.[60] Observing this tide of progression, Carsten commented, "the recognition that acts of private actors may give rise to an armed attack is anything but revolutionary."[61] Thus, 9/11 set a profound change in that tradition and brought independent acts of private actors/terrorists within the ambit of an armed attack provided that such an attack is of significant *scale* and *effect*.[62] In the aftermath of the attack, the Security Council, in resolution 1368(2001) and, 1373(2001) stated the United States' inherent right of self-defense in accordance with the Charter by declaring the attack of 9/11 as "terrorist attacks" and "threat[s] to international peace and security."[63] Also, NATO and the Organization of the American States declared the attack as an "armed attack" and vowed to exercise their right to collective self-defense.[64] NATO, for example, did not require evidence to the effect that the attack of 9/11 be attributed to the Taliban regime or Afghanistan, rather it asked whether the "attack was directed from abroad against the United States" and could therefore "be regarded as an action covered by Article 5 of the Washington Treaty."[65]

However, many academics disagree that the events of 9/11 represented a "rigorous change in the law" or that the decision of NATO, the Security Council, or the Organization of the American States on the particular facts of the events of 9/11 constituted a general and uniform state practice that constitutes a rule of customary international law that applies beyond that specific fact.[66] They rather see the change, for several reasons, as a "change in fact" which shifts back as the euphoria for security subsides.[67] Those who refute the argument that 9/11 constituted a "rigorous change in law", point to the uniquely dangerous and alarming dimension of the 9/11 attack which gave it the political legitimacy and momentum necessary to galvanize enormous support to broaden the scope of the rule.[68] In refuting the argument that State practice and world opinion after 9/11 constituted a change in the scope of Article 51, they point to the existence of a

59. *See* Murphy, *supra* note 25, at 41.
60. *See* GRAY, *supra* note 5, at 159.
61. Stahn, *supra* note 55, at 42.
62. *See id.* at 45.
63. S.C. Res. 1373, para. 2-4, U.N. Doc. S/RES/1373 (Sept. 28, 2001); S.C. Res. 1368, para. 2-3, ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001).
64. *See* O'CONNELL, *supra* note 5, at 10.
65. NATO Press Release, *supra* note 24.
66. Stahn, *supra* note 55, at 35-36.
67. *Id.* at 36.
68. *Id.* at 35-36.

State actor, Afghanistan, to whom the acts of the perpetrators of the 9/11 attack is legally attributable.[69] Although the changing realities of global politics and power relationships required serious reconsiderations of several rules of international law relating to use of force and the conduct of hostilities,[70] selective revisions prompted by a single catastrophic event, such as 9/11, carries its own dire ramifications.[71] Some academics see the events of 9/11 as mere 'conventional crimes' rather than an "armed attack."[72] Summarizing his concern about the ongoing debate, Carsten Stahn noted:

> It may be of greater consequence to admit openly that the requirement of attributability does not play a role in the definition of armed attack. Such a step would certainly mark a qualitative change in the application of Article 51 because it breaks with the conception of Article 51 as a state-centered norm.[73]

Nonetheless, there are strong arguments, today, that reject the legal requirement of a state-actor to qualify an act as an armed attack, without however, ignoring the relevance of such a nexus in identifying the State towards which the self-defensive measure will be directed.[74]

Nicaragua brought to light a slightly different dimension of what constituted an "armed attack" under Article 51 in the 80s. The Court required the existence of a legal attribution of sort, meeting the test of effective control, not even an overall control, between the acts of a non-state actor and a State to qualify an act as an "armed attack."[75] Opposing the restrictive approach of the Court to the question of what constituted an "armed attack," Judge Jennings argued in dissent that "it seems dangerous to define unnecessarily strictly the conditions for lawful self-defen[s]e, so as to leave a large area where both a forcible response to force is forbidden, and yet the United Nations employment of force, which was intended to fill that gap, is absent."[76] Despite the two Security Council Resolutions issued in the wake of 9/11 and the almost unanimous support given to United State's military intervention in Afghanistan, the ICJ seems to have stood by its *Nicaragua* test in at least two post 9/11 cases.[77]

In its advisory opinion in the *Palestinian Territories,* the Court rejected the Israeli claim to self-defense on the reasoning that self-defense under Article 51 is

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69. Guruli, *supra* note 37, at 109.

70. *See id.* at 115.

71. *See* Stahn, *supra* note 55, at 41; Geir Ulfstein, *Terrorism and the Use of Force*, 34 SECURITY DIALOGUE 153, 153-54 (2003).

72. *See* Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559, 573-74 (2002); Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 995-98 (2001); Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839, 840 (2001).

73. Stahn, *supra* note 55, at 42.

74. *See* Guruli, *supra* note 37, at 108-109.

75. *See Nicaragua*,1986 I.C.J. at 65-65, ¶ 115.

76. *Id.* at 543-44.

77. *See Territory of the Congo*, 2005 I.C.J. 168; *Palestinian Territory*, 2004 I.C.J. 136.

not available to Israel against non-state actors operating on the territories under the control of Israel.[78] In *Territory of the Congo*, the Court required the responsibility of the Congo for the multifarious offensive actions of Ugandan rebels from the Congolese territories in order to find Uganda's right to self-defense legitimate.[79]

In *Territory of the Congo*, repeating the precedent it set in *Nicaragua*,[80] the ICJ refuted Uganda's claim to self-defense proclaiming that:

> It is further to be noted that, while Uganda claimed to have acted in self-defen[s]e, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The "armed attacks" to which reference was made came rather from the ADF. The Court has found above (paragraphs 131-135) that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3[ ](g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC. For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defen[s]e by Uganda against the DRC were not present.[81]

Starkly putting the question is Professor Thomas Franck, who criticizes the majority's view of a narrower construction of Article 51. He asks: "was the state from which insurgents were operating legally responsible (in the sense of Charter Article 51) for their activities in El Salvador and Uganda?"[82] Franck continues, "[p]ut that way, and answered by the Court in the negative," i.e., no sufficient evidence found for attribution, "the question precluded invocation of the right of self-defense" by the United States and Uganda.[83] Moreover, the State that is subject to an armed attack is precluded from resorting to force under the Charter even if the acts of the insurgents, evaluated on their own, amount to an armed attack justifying self-defense under Article 51.[84] This holds true unless the acts of the insurgents operating in the territories of States constitute the act of those States under the law of State responsibility.[85] Professor Frank further observes "the judges [the majority] could have replaced the question of attribution with a finding

78. *Palestinian Territory*, 2004 I.C.J. at 194, ¶ 139.

79. *See Territory of the Congo*, 2005 I.C.J. at 222, ¶ 146.

80. *See Nicaragua*, 1986 I.C.J. 14

81. *Territory of the Congo*, 2005 I.C.J. at 222-23, ¶ 146-47.

82. Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 722 (2008).

83. *Id.*

84. *See id.*

85. *See id.* at 736-37; *see Territory of the Congo*, 2005 I.C.J. at 222, ¶ 146; *Nicaragua*, 1986 I.C.J. at 65, ¶ 116.

of liability of states for injurious effects emanating from their territory and affecting the rights of neighboring states."[86]

It seems that whatever change existed in the context of non-state actors/terrorist acts of such an alarming magnitude, the change does not of itself allow States to independently declare such acts as an "armed attack" and entitle themselves to an armed response.[87] The Security Council in accordance with the Charter authorized the attack against Afghanistan in the aftermath of 9/11.[88] In order for terrorist acts of a "significant scale,"[89] designed and launched by an independent private actor to be considered as an "armed attack" there should be Security Council authorization allowing the victim State to exercise its right to self-defense.[90] In addition, the resort to force must anticipate a proper identification of the responsible State.[91]

That being said, it is important to situate the UIC and Ethiopia's alleged threat and mounting fear of attack into perspective in the light of these new developments. According to the Ethiopian and the United States governments, some elements within the Court's Union are terrorists or at least affiliated with terrorist organizations.[92] To substantiate their allegations, they pointed to the then head of the Court's Union, Sheikh Hassen Dahir Awyes, who according to the Ethiopian government, was the leader of *Ali-Itihad-al-Islamia*.[93] Nevertheless, neither Ethiopia nor the United States declared the UIC *in toto* as a terrorist organization. For the same reason, former members of the Court's Union are now leading the TFG.[94]

Be that as it may, whatever change occurred in the law governing the use of force, it did not affect the scope of Article 51. The US military response to the attacks of 9/11 followed the second exception to Article 2(4) of the Charter, namely, Security Council determination of the attack as a breach of international peace and security and its subsequent authorization of the victim State to self-

86. Franck, *supra* note 83, at 722.

87. *See* O'CONNELL, *supra* note 5, at 7.

88. *See* S.C. Res. 1373, *supra* note 64.

89. *Nicaragua*, 1986 I.C.J. at 104, ¶ 195.

90. *See, e.g.*, O'CONNELL, *supra* note 5, at 5.

91. *Id.* at 7.

92. *See* David H. Shinn, *United States – Somali Relations: Local National and International Dimensions*, EAST AFRICA FORUM, Apr. 26, 2010, http://eastafricaforum.net/2010/4/28/united-states-somali-relations-local-national-and-international-dimensions/; *Quick Guide: Somalia's Islamists*, BBC NEWS, Dec. 28, 2006, http://news.bbc.co.uk/2/hi/africa/6043764.stm. On December 16, 2008, the Assistant Secretary of State was quoted as saying: "The Council of Islamic Courts is now controlled by al-Qaeda cell individuals, East Africa al-Qaeda cell individuals. The top layer of the [sic] court are extremists. They are terrorists. . . . They are killing nuns, they have killed children and they are calling for a jihad (holy war)." Sue Pleming, *U.S. says al Qaeda radicals lead Somali Islamists*, REUTERS, Dec. 14, 2006, http://www.alertnet.org/thenews/newsdesk/N14424846.htm (internal quotation marks omitted).

93. *See Profile: Somalia's Islamic Courts*, BBC NEWS, June 6, 2006, http://news.bbc.co.uk /2/hi/5051588.stm.

94. *U.S. Should Accept Islamist Authority, Report Says*, INTER PRESS SERVICE, Mar. 12, 2010, *available at* WL 3/12/10 allAfrica.com 12:34:08.

defensive measures. However, NATO's and OAS's characterization of the events of 9/11 as an 'armed attack', supports the view that 9/11 brought about a change in the scope and substance of Article 51 of the Charter. However, this one time practice does not constitute a new rule of customary international law that modifies the substance of Article 51. Furthermore, nothing in treaty law or state practice suggests the characterization of a non-state actor as a terrorist or otherwise modifies the rule under Article 51 of the Charter. A terrorist attack by itself against a State, if it is not of a significant scale and not attributable to State, does not qualify as an "armed attack."[95] On the contrary, there is no reason why an attack by a non-terrorist non-state actors, if it is of a significant *scale* and *effect* and attributable to the State, should not be considered an "armed attack." The rationale that informed NATO and OAS member States' consideration of 9/11 as an armed attack seems to relate, among other things, to the gravity of the attack: where the attack originated from, "the source of the attack (i.e. the actor), the weapons/method of force used, the gravity of the attack, the location of the attack, and the national and international reaction" to the attack.[96] On the same reasoning, one could argue, if an attack from the UIC against the Ethiopian State is significant enough in terms of its *scale* and *effect* or in the light of the developments discussed above, there is no reason why it should not be considered an armed attack within the meaning of Article 51.

However, one might challenge the above contentions by pointing to Article 2(4) of the Charter which prevents the use of force by a State against another State to reinforce the argument that the exception under Article 51 is a right to self-defense in response to an attack occurred in violation of Article 2(4).[97] Thus, since Article 51 is an exception to Article 2(4), which prohibits use of force by States, the response under Article 51 must be to an "armed attack" by a State.[98] However, the factual situations portrayed by the UIC as an entity that was in control of most parts of Somalia as of December 2006, makes it more than just a non-state actor and certainly entitles it to a *de facto* regime status.[99] If the recent change in contemporary international law recognizes the rights of States to self-defense against terrorist acts of grave magnitude,[100] the right of States to defend themselves from a *de facto* regime conforms even better to the *raison d'être* that represented whatever shift in the law.

On a more conceptual level, the characterization of the UIC, at the relevant time, as a *de facto* regime rather than a mere terrorist group[101] strengthens the argument of those who supported a broader construction of Article 51 to

95. *See* Guruli, *supra* note 37, at 110-14.

96. *Id.* at 110.

97. *See id.* at 103.

98. *Id.*

99. *See* U.N. Office for the Coordination of Humanitarian Affairs, *Somalia: UIC Disarms Militia, Tightens Control Over Kismayo*, IRINNEWS.ORG, Sept. 28, 2006, http://www.globalsecurity.org/military/library/news/2006/09/mil-060928-irin01.htm.

100. *See* Guruli, *supra* note 37, at 108-09.

101. *See Finding an End to the Somali Crisis*, U.N. INTEGRATED REG'L INFO. NETWORKS, Aug. 18, 2006, *available at* Westlaw, 8/18/06 allAfrica.com 16:58:48.

accommodate not only acts of State but also of non-state actors.[102] Furthermore, it was even contended that *de facto* regimes are bound by the provisions of Article 2(4) of the Charter regardless of individual or collective international recognition.[103] Even if Ethiopia and other members of the international community recognize the TFG, by virtue of actual territorial control, the UIC is bound by the prohibitions set forth in Article 2(4).[104] It follows that conduct by a non-state actor, such as the UIC, if it is contrary to the stipulation of Article 2(4) and of significant scale, can qualify as an "armed attack" and trigger Ethiopia's right of self-defense.[105] Therefore, the non-state-actor nature of the UIC does not deny Ethiopia the right to resort to self-defensive measures if other conditions of the law are fulfilled.

C. How Significant Must the Attack Be? The 'Scale' and 'Effect' Test

The third major requirement of Article 51 relates to the gravity of the armed attack.[106] Generally, in order for self-defense to be lawful, a *significant* armed attack must have "already occurred"[107] "against the territorial integrity and political independence of States."[108] The application of Article 51 will be triggered only when an armed attack of a significant *scale* and *effect* has already occurred against a State.[109] Hence, the Ethiopian State must demonstrate that not only an attack has already occurred "against its territorial integrity and political independence," but an attack of a significant *scale* and *effect*, have already occurred against its "territorial integrity or political independence."[110]

The language of Article 51 is silent on the requirement of gravity of the attack.[111] In considering the question of the "sending by a State of armed bands," the ICJ introduced a *scale* and *effect* based test when it held that the prohibition of

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102. *See* Guruli, *supra* note 37, at 107-08 (discussing the two different theories regarding what constitutes an "armed attack").

103. *See* Stahn, *supra* note 55, at 42.

104. Jackson Mbuvi, *Only a Spirit of Give and Take will Work*, ALLAFRICA.COM, Nov. 16, 2006, *available at* Westlaw, 11/16/06 allAfrica.com 01:34:41.

105. *See* Guruli, *supra* note 37, at 108 (drawing similarity between the United States right of self-defense used against the 9/11 attacks, which qualify as an "armed attack" of a significant scale against the United States, and Ethiopia's possible right of self defense against the UIC).

106. *See* O'CONNELL, *supra* note 5, at 5-6.

107. *Id.* at 5.

108. *Id.* at 4.

109. *See Nicaragua*, 1986 I.C.J. at 103-04, ¶¶ 194-95.

110. U.N. Charter art. 2, ¶ 4; *Nicaragua*, 1986 I.C.J. at 103, ¶ 195 (establishing the law regarding when an attack qualifies as an "armed attack" because of the scale and effect of the attack). The fact intensive/specific nature of this requirement is apparent. It requires a higher threshold of evidence usually unavailable for academic research. In addition to the gravity of the attack Ethiopia claimed to have suffered before the days and months leading to the December 24, 2006, the very existence of any such attack against the "territorial integrity and political independence" of Ethiopia, cannot be empirically verified. Since the evidence necessary for the analysis of Ethiopia's conduit is far from being sufficient, the following discussion relies on governmental statements, official correspondences between governments and international organizations to examine the legality of resort to force.

111. *See* U.N. Charter art. 51.

armed attacks may apply to "the sending by a State of armed bands on to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack [rather than a mere frontier accident] had it been carried out by regular armed forces."[112] Although the Court did not set an objective threshold that must be reached in order for the use of an armed band to rise to an armed attack, it nevertheless unequivocally stipulated that it should occur on a "significant scale."[113]

There are voices within the Ethiopian political spectrum and within the international community unconvinced about the occurrence of such an attack, and even if such an attack did occur, they question the significance of its *scale* and *effect* as to trigger Ethiopia's self-defensive response.[114] Some opposition members of the Ethiopian Parliament echoed concern and skepticism about the gravity of the danger posed against Ethiopia and the overall intent of the government.[115] This sentiment was echoed in a vigorous debate that took place in the parliament.[116] Responding to a question from opposition MPs on whether Ethiopia is engaging in preemptive self-defense, the Ethiopian Prime Minister stated unambiguously that the Country had already come under attack from the UIC,[117] without elaborating in detail the gravity, place and time of that attack.[118] Prime Minister Meles Zenawi refrained from making a public statement about the details of the attack owing to national security concerns and asked the Speaker of the House to adjourn for a new session to allow time for deliberation on the evidence with the opposition.[119] In the next session of parliament devoted to the consideration of this resolution, major

112. *Nicaragua*, 1986 I.C.J. at 103-04, ¶ 195 (emphasis added).

113. *Id.*; W. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects, in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 26, 39 (Lori Fisler Damrosch & David J. Scheffer eds., 1991) (quoting *Nicaragua*).

114. *See* Abeje Tesfaye, *The Responsibility to Protect Somalia*, ETHIOPIAN REPORTER, Aug. 12, 2006, *available at* Westlaw, 8/12/06 allAfrica.com 07:04:01.

115. Bruck Shewareged, *Politics – On the Brink of War – Government Seeks Parliamentary Backing*, ETHIOPIAN REPORTER, Nov. 29, 2006, *available at* Westlaw, 11/29/06 allAfrica.com 17:56:19.

116. *See id.* (explaining the differing views of members of the parliament regarding the adjournment motion).

117. *Id.*

118. *See id.* When the PM presented a four-point resolution to the parliament seeking authorization to take any means necessary to curb possible attack from forces in Somalia, opposition political parties pressed the PM to provide genuine evidence that Ethiopia s indeed attacked by the UIC. In a televised parliamentary debate, the PM expressed his willingness to share 'sensitive' national security evidence with political parties in private so that the house unanimously pass the resolution backing the government. However, most opposition parties remained opposed to the resolution after deliberating with the government on the evidence. When the resolution was re-tabled before parliament for voting, most opposition parties either voted against or abstained. The PM commented that the difference between the government and the opposition lies at the heart of the third point in the resolution, which accuses Ethiopian insurgencies based in Eritrea and Somalia collusion with foreign forces to attack Ethiopia. The resolution was passed by a vote of 311 to 99 with 11 abstentions. *See Parliament Endorses Resolution to Reverse Somali Islamists Aggression, Press Section*, MINISTRY OF FOREIGN AFFAIRS ETHIOPIA, Dec. 1, 2006, http://mfa.gov.et/Press_Section/publication.php? Main_Page_ Number=3221.

119. Shewareged, *supra* note 116.

opposition parties either abstained or voted against the resolution that authorized the government to take "all necessary and legal steps" to repel the danger.[120] Defending UEDF's (Union of Ethiopian Democratic Forces) position on the resolution, Professor Beyene Petros, then an MP, expressed his doubts in the following terms:

> If sporadic incursion warranted a declaration of war, there would be no peace any[ ]where. Here, we are only being told of sporadic incursions and there is nothing to show us . . . an act of invasion. Therefore we do not believe the threat is being appropriately defined [nor] that it justifies such resolution.[121]

UEDF's leader, Beyene Petros, agrees with the government: Ethiopia might have been attacked by Ethiopian rebel forces operating from within an area under the control of the UIC.[122] However, his party has opposed the characterization of such attacks from insurgent groups as "invasion" by the UIC and has refused to support the resolution that authorized the government to declare war on insurgent groups.[123]

For the purpose of self-defense under Article 51, Ethiopia must have suffered an armed attack of a significant magnitude in terms of its *scale* and *effect* for its self-defensive measure to be lawful under the law.[124] From the conditions required by the law and analyzed above, Ethiopia's self-defensive measure does not seem to comply with requirement of an armed attack of a significant *scale* and *effect*, a requirement at the very core of the Charter regime on self-defense.[125] However, if it is established that Ethiopia has been under repeated attacks that are not in and of themselves individually significant enough to trigger its self-defensive measure, one might argue that an "accumulation of events" doctrine allows the government to accumulate the small scale attacks as constituting one serious and significant attack.[126] However, this doctrine is not well received in international law and does not seem consistent with the position of the Charter.[127]

Ethiopia also defended its action before and after the war on the basis of the existence of what it called a "clear and present danger."[128] Indeed, Ethiopia tended to favor this line of argument more than the argument that "the right of self defen[s]e arises only if an armed attack . . . occurs."[129] As discussed above in

120. *See* Dagnachew Teklu, *MPs Vote to Fend Off Islamist "Jihad War"*, DAILY MONITOR, Dec. 5, 2006, *available at* Westlaw, 12/5/06 allAfrica.com 01:46:39.

121. Namrud Berhane, *Eritrea will Fight to the Last Somali, not the Last Eritrean – Meles*, ETHIOPIAN REPORTER, Dec. 4, 2006, *available at* Westlaw, 12/4/06 allAfrica.com 15:37:31.

122. *See* Yelibenwork Ayele, *Ethiopia: UEDF Defends its Position*, ETHIOPIAN REPORTER, Dec. 9, 2006, http://allafrica.com/stories/200612110387.html.

123. *See* Berhane, *supra* note 122.

124. *See Nicaragua*, 1986 I.C.J. at 103-04, ¶¶ 194-95.

125. *See* Tesfaye, *supra* note 115.

126. Howard A. Wachtel, *Targeting Osama Bin Laden: Examining the Legality of Assassination as a Tool of U.S. Foreign Policy*, 55 DUKE L.J. 677, 693 (2005).

127. *Id.* at 693-94.

128. Shewareged, *supra* note 116; Teklu, *supra* note 121.

129. GRAY, *supra* note 5, at 98. During the discussion in the parliament, the Ethiopian government

detail, threats, whether imminent or otherwise, do not entitle one to resort to armed response under the Charter.[130] Since the Charter rules on self-defense have a separate existence than the rules of self-defense in customary international law, the next sections will examine the validity of Ethiopia's right to self-defense under customary international law.

IV. ETHIOPIA'S USE OF FORCE UNDER CUSTOMARY INTERNATIONAL LAW

Some scholars have argued that customary international law allows the right to a defensive measure in anticipation of an attack even if an armed attack did not occur.[131] Professor Bowett for example contends that Article 2(4) of the Charter did not impair State's customary right to self-defense and did not confine it to a response to armed attack.[132] In a similar fashion, Sir Humphrey Waldock observed that "where there is convincing evidence not merely of threats and potential danger but of *an attack being actually mounted*, then an armed attack may be said to have begun to occur, though it has not passed the frontier."[133]

The exchange between the United States and United Kingdom following the *Caroline* incident is considered an authoritative statement, reflective of customary international law on the use of force.[134] In this correspondence, the then Secretary of State, James Webster, articulated the notion that self-defense must be limited to situations in which "the necessity of that self-defen[s]e is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[135] Professor O'Connell contends that the formula in *Caroline* is consistent with "the letter and sprit of the Charter."[136] Schachter also observes that the delegates to the Security Council discussed the rule in *Caroline* following the *Osirak* incident.[137]

In that exchange, Mr. Webster neatly articulated the rule that "the act, justified by the necessity of self-defens[e], must be limited by that necessity, and kept clearly within it."[138] It is from these statements that the touchstone principles of necessity and proportionality evolved.

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has persistently referred to the vernacular of a "clear and present danger" produced by combination of four points presented to the Parliament as constituting the basis for such a danger. *See* Shewareged, *supra* note 117; Teklu, *supra* note 122 (internal quotation marks omitted).

130. *See* O'CONNELL, *supra* note 5, at 8, 13.

131. *Id.* at 9.

132. BROWNLIE, *supra* note 7, at 269.

133. O'CONNELL, *supra* note 5, at 8-9.

134. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1635 (1984); *see also* O'CONNELL, *supra* note 5, at 9 (concluding that the *Caroline* doctrine is consistent with the Charter and the Charter by now is considered crystallization of customary international law); *but see* GRAY, *supra* note 5, at 98 (portraying the two differing positions argued with respect to Article 51 through a paradigm called "the Academic Debate"; while some argue that the inherent right of the State to self-defense allows anticipatory self-defense, others argue that the right is limited to cases when an armed atta already occurred).

135. *Id.* at 1635.

136. O'CONNELL, *supra* note 5, at 9.

137. Schachter, *supra* note 135, at 1635.

138. JOHN F. MURPHY, THE UNITED NATIONS AND THE CONTROL OF INTERNATIONAL VIOLENCE: A LEGAL AND POLITICAL ANALYSIS 17 (1983).

A. Armed Response Should Be Necessary: The Requirement of Necessity

According to *Caroline*, the necessity that provokes self-defense should be one that is "instant, overwhelming, and leaving no choice of means, and no moment of deliberation."[139] What is instant and overwhelming depends on a number of factual circumstances ruling at the relevant time and space and there is no empirical formula that helps make an objective determination of what fits into this parameter. Indeed, given the danger posed against States by acts of "terrorism," the eminence and proximity of the danger should be assessed in relative terms. For example, a State equipped with some of the most sophisticated and advanced military technology should not be held to the same standard of necessity as poor countries that do not possess the necessary intelligence and technical knowledge to appreciate the eminence and gravity of the threat and the means with which to respond to it.

The Ethiopian Premier told Parliament that the Islamists in Somalia have presented a "clear and present danger" against the country's peace and security.[140] According to the resolution passed by the Ethiopian Parliament, a combination of four major factors triggered Ethiopia's right to lawful self-defense: a) The presence of Eritrean troops in Somalia with the sole purpose of destabilizing the peace and stability of the Ethiopian State; b) the repeated declaration by UIC of a holy war—*jihad*—against Ethiopia and the flow of arms and financial support to the group from several Middle Eastern countries; c) the operation of armed Ethiopian opposition groups from within the areas under the control of the UIC with the view to overthrowing the legally constituted government of Ethiopia; and d) the presence of foreign militant fighters alongside the UIC which constituted a situation of "clear and present danger" against the territorial integrity and political independence of the Ethiopian State.[141] In particular, the emergence of the UIC as a real political force while Ethiopia was militarily confronting secessionist

139. CHARLES CHENEY HYDE, INTERNATIONAL LAW 239 (1945), *reprinted in* MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE: CASES AND MATERIALS 122 (2005); *See also* Gabcíkovo-Nagymaros Project, (Hung./Slovk.), Judgment, 1997 I.C.J. 7, at 40–41, ¶¶ 51–52 (Sept. 25); Fisheries Jurisdiction (Spain v. Can.), Judgment, 1998 I.C.J. 432 (Dec. 4).

140. *See*, Jonathan Clayton, *Ethiopia Confronts Somali Warlords*, SUNDAY TIMES, Nov. 24, 2006, http://www.timesonline.co.uk/tol/news/world/article648189.ece (internal quotation marks omitted).

141. *See* Press Conference, Prime Minister of Ethiopia Meles Zenawi (June 26, 2007), http://www.ethio embassy.org.uk/Archive/PM%20Meles%20Zenawi%20Press%20Conference%2027th%20June%202006.html, (Last accessed 19 February 2009) ("[Y]ou have the messenger voice of the government of Eritrea who has been actively involved in the fighting in Mogadishu. Theirs is not a specifically Somali agenda. And finally, you have the jihadists led by Al-Ithad Islami, which I am sure you know, is registered by the United Nations as a terrorist organization. And so, for us, the Islamic Courts Union is not a homogeneous entity. Our beef is with Al-Ithad, the internationally recognized terrorist organization. It so happens that at the moment the new leadership of the Union of the Courts is dominated by this particular group. Indeed, the chairman of the new council that they have established is a certain colonel who also happens to be the head of Al-Ithad. Now, the threat posed to Ethiopia by the dominance of the Islamic Courts by Al-Ithad is obvious."); *See also* Clayton, *supra* note 141; *Ethiopian Parliament Authorizes Action Against Somali Islamists,* TURKISHPRESS.COM (Nov. 30, 2006), http://www.turkishpress.com/news.asp?id=153555.

movements in the Ogaden region of Ethiopia, heightened Ethiopia's threat and strengthened its contention on the inevitability of an attack.[142]

An even more threatening situation was the allegation that the officials of the UIC divulged their intention of reuniting all Somali speaking regions around Somalia, signaling the beginning of its vision to integrate the Somali people of Ethiopia into mainland Somalia contrary to principles of international law.[143] As one analyst familiar with the geopolitical dynamics of the region commented, "some leaders in the [UIC], certainly including Hassan Dahir Aweys, wish to reenergize the Greater Somalia concept by incorporating into Somalia those Somali-inhabited parts of Ethiopia, Kenya, and Djibouti."[144] The Ethiopian Parliament Resolution authorizing the government to take all legal and necessary measures against invasion by the UIC contended that "the [UIC] ha[s] an expansionist intent to annex the Somali-speaking parts of Ethiopia, Kenya and Djibouti."[145]

Despite these allegations and bold assertions by the UIC, some analysts dismissed UIC's propaganda as empty rhetoric and held that the UIC was not a viable threat to Ethiopia's territorial integrity and political independence at the time of intervention.[146] In the words of former US Ambassador to Ethiopia, Professor David Shinn:

> The Ethiopian military is far more powerful than the militias of the Islamic Courts, which cannot at this writing, pose a serious military threat to the Ethiopian homeland, including the Somali-inhabited Ogaden region. The Ethiopian military has the capacity to defeat handily the Islamic Court militias inside Somalia in conventional engagements.[147]

In both the *Nicaragua* and *Congo* cases, the ICJ has failed to provide guidance as to what constitutes an "imminent threat of armed attack" and expressly stated that:

> [R]eliance is placed by the Parties only on the right of self-defense in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has

142. *See* Clayton, *supra* note 141.

143. *See Somalia: U.S. Government Policy and Challenges: Hearing Before the Subcomm. on African Affairs of the Comm. on Foreign Relations*, 109th Cong. (2006) [hereinafter *Hearing*] (statement of Hon. David H. Shinn, Adjunct Professor, Elliott School of Int'l Affairs, George Washington University), *available at* http://bulk.resource.org/gpo.gov/hearings/109s/34879.txt.

144. *See id.*

145. Zeray W. Yindego, *Ethiopia's military action against the Union of Islamic Courts and others in Somalia: some legal implications*, INT'L & COMP. L.Q., 2007, at 2.

146. *See* David Shinn, *The Ethiopia-Somalia Conflict*, NASRET.COM, ¶3 (Dec. 27 2006), http://www.nazret.com/php/uploadnews/search.php?misc=search&subaction=showfull&id=1167422763&archive=&cnshow=news&ucat=&start_from=&.

147. *Id.*

> not been raised. Accordingly, the Court expresses no view on that issue.[148]

Ethiopia holds that Eritrea's multifaceted actions in Somalia are aimed at its territorial integrity and political independence.[149] It maintained that Eritrea trains, arms, and hosts Ethiopian opposition armed groups, such as the Ogaden National Liberation Front (ONLF) and the Oromo Liberation Front (OLF), with the manifest desire to destabilize the stability of the Ethiopian state.[150] To that effect, it was indirectly using, at the relevant time, the UIC controlled territories of Somalia as a launching pad and alludes to the United Nations Report to corroborate its allegations.[151] More specifically, the Ethiopian government contended that Eritrea was preparing for another round of armed confrontation as the UIC, foreign jihadists, and other forces displayed their unflinching desire to attack Ethiopia.[152] Ethiopia contends the existence of ever mounting threat by pointing to the repeated declaration of *jihad* by the UIC and the increasing offensive capability of this force with the material and military support from such countries as Iran, Egypt, Saudi-Arabia and others.[153]

Indeed, the various threats facing Ethiopia at the time bring to mind the surmounting risks that lie ahead. However, even though the cumulative effect of these four factors could amount to a serious threat to Ethiopia's sovereignty,[154] it is doubtful that the UIC and the foreign insurgent forces, at the time, presented a danger so grave and imminent as to amount to a situation that is "instant, overwhelming" and one that denied Ethiopia the choice of means and a moment for deliberation. The relative advantage the Ethiopian army has over the UIC is one such factor distancing the realization of any such eminence.[155] For the Ethiopian government, however, given the political and legal circumstances ruling at the time, failure to act would have simply mounted the risk. A delay would have only postponed the threat, not averted it. This is precisely so because of the role-played and the pressure exerted by Eritrea and the United States on their respective

148. *Nicaragua*, 1986 I.C.J. at 103, ¶ 195; *see also Territory of the Congo*, 2005 I.C.J. at 222, ¶ 143 (quoting *Nicaragua*).

149. *See Blame Game Over Somalia Conflict*, GLOBAL POLICY FORUM, Apr. 24, 2007, http://www.globalpolicy.org/security/issues/ethiopia/2007/0413blame.htm ("Ethiopia's Minister of State for Foreign Affairs Tekeda Alemu charged that "Eritrea is not simply supporting terrorism, it is actively involved in terrorism in Ethiopia and our sub-region.'").

150. *See* U.N. Sec. Council Comm., *Rep. of the Monitoring Group on Somalia pursuant to Sec. Council resolution 1676*, ¶¶ 22-23, 26-27, 30, U.N. Doc. S/2006/913 (Oct. 16, 2006) [hereinafter U.N. Sec. Council Comm. *Rep. pursuant to resolution 1676*]; *see also Blame Game Over Somalia Conflict*, *supra* note 150.

151. *See* U.N. Sec. Council Comm., *Rep. pursuant to resolution 1676*, *supra* note 151, at ¶¶ 22-23, 28, 218. In its 2006 Report to the Security Council, the Monitoring Group announced the participation of forces of Eritrea, OLF, ONLF and the UIC in the war leading to UIC's occupation of Kismaayo. The MGO also reported the shipment of arms to ONLF, OLF and the UIC from Eritrea. *Id.*

152. *Id.* ¶ 222.

153. *Id.* ¶ 213.

154. *Id.* at 6.

155. *See Id.* ¶ 222.

proxies to act and not delay.[156] However, these political considerations, which instigated and created a trump-mood over the legal requirements, do not seem to create a state of necessity that is of itself "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[157]

In *Territory of the Congo*, the ICJ did not find Uganda's action necessary, even if Uganda was threatened by a non-state actor operating on the territory of the Congo.[158] The Court and the applicant States have recognized the existence of an armed attack against Uganda which the Court referred to as "series of deplorable attacks."[159] The fact that the rebel groups threatening Uganda's security received support from the Sudan and launched an attack from the DRC did not change the conclusion of the Court. The Court did not find the threat grave enough as to justify the resort to armed force against the territories of the Congo.[160] In this judgment, the Court dismissed Uganda's claim to the exercise of its right to self-defense on both counts of necessity and proportionality.[161] Uganda told the Court that it carried out a military operation on the Congolese soil with the sole purpose of diffusing "the offensive capabilities" of FUNA,[162] an insurgent organization allegedly bent on destabilizing Uganda using the DRC as a launching pad.[163] Rejecting Uganda's argument for the existence of a necessary condition that justified a resort to force, the Court held that "the evidence did not support the Ugandan claim to have been attacked or threatened on such a scale as to give rise to a right to resort to military force in self-defense on the territory of the Congo."[164]

In her analysis of the state of the law relating to the use of force post 9/11, Professor O'Connell concludes that in the face of an obvious intention, on the part of the enemy to continue to pose a threat, armed self-defense is legitimate.[165] The repeated declaration of a holy war might demonstrate an irrevocable intention of the UIC to attack Ethiopia whenever it acquires the necessary military capability to do so.[166] However, the level of threat that the UIC posed against the Ethiopian State is not as grave and imminent as to justify self-defense. The ICJ is clear in holding that the "series of deplorable attacks" against Uganda do not justify Uganda's self-defensive measures against the insurgencies in the Congo.[167]

156. *See* Clayton, *supra* note 141.

157. HYDE, *supra* note 140, at 122.

158. *Territory of the Congo,* 2005 I.C.J. at 223, ¶ 147.

159. *Id.* ¶ 146.

160. *Id.*

161. *Id.* ¶ 147.

162. *Id.* ¶ 45.

163. *Id.* ¶ 120.

164. *Id.* ¶ 147.

165. O'CONNELL, *supra* note 5, at 10. Relying on resolution 1368/2001 and 1373/2001 of the Security Council and the position of NATO member States, Professor O'Connell argues that whenever there is a clear and convincing evidence that the enemy the intention or motive to continue to threat a State, then the State is within its rights to defend it self by use of armed force. *Id.* at 9.

166. *See* U.N. Sec. Council Comm., *Rep. pursuant to resolution 1676*, *supra* note 151, ¶ 204.

167. *Territory of the Congo,* 2005 I.C.J. at 222-23, ¶¶ 146-147.

The other requirement relates to the existence of another alternative—a "choice of means"—other than the use of an armed force that could have prevented the necessity of self-defense.[168] One of the most resonating contentions advanced by Ethiopia holds that the forces under the umbrella of the UIC and the Eritrean government were working on the basis of a common design and motive to achieve a common purpose—destabilizing and endangering the territorial integrity and political independence of Ethiopia.[169] However, the UIC was not a proper government and can hardly be dealt with by diplomatic or legal means. Ethiopia claimed that it exhausted all diplomatic means available to avoid the confrontation but to no avail.[170] Although the *de facto* character of the UIC and the impossibility of pursuing a legal course against this force are true enough, the absence of this condition alone does not constitute a condition of necessity justifying Ethiopia's resort to force. Indeed, the Ethiopian government had serious security concerns at the time.[171] However, necessity as a justification requires an exceptionally higher threshold of mounting peril that is instant, overwhelming and should be one that does not leave any moment for deliberation. Ethiopia was certainly not under that kind of situation at the time it went to war.

Ethiopia's contention that the UIC is acting as a proxy for Eritrea and that it is providing a safe heaven to the Ethiopian rebel forces operating within Eritrea and Somalia is supported by the findings of the UN Monitoring Group.[172] Accordingly, the official view holds that the only feasible recourse available is to take a self-defensive measure against the forces that host and infiltrate what Ethiopia deems as anti-peace elements into its territory and the stationing of foreign jihadists on its border.[173] In the words of Ethiopia's Ambassador to the UK, Mr. Birhanu Kebede, "the extremist forces have been training anti-Ethiopian elements and infiltrating them to Ethiopia as well as repeatedly attacking Ethiopia."[174] Ethiopia's Premier, Meles Zenawi, emphasized the link between the attack against Ethiopia and the UIC when he accused the UIC of infiltrating anti-Ethiopian rebel forces "sheltered in areas under its control."[175] Outlining the effort of the Ethiopian government to avoid military confrontation, the Prime Minister said:

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168. O'CONNELL, *supra* note 5, at 9.

169. *See Blame Game Over Somalia Conflict*, *supra* note 150.

170. *See, e.g.*, Aregu Balleh, *Ethiopia Will Continue to Seek Peaceful Options to Deal With UIC - State Minister*, ETHIOPIAN HERALD, Dec. 3, 2006, *available at* Westlaw 12/3/06 allAfrica.com 19:32:12.

171. *See Ethiopia Has Genuine Security Concerns - U.S.*, ETHIOPIAN HERALD, Dec. 29, 2006, *available at* Westlaw 12/29/06 allAfrica.com 18:09:04.

172. *See* U.N. Sec. Council Comm., *Rep. pursuant to resolution 1676*, *supra* note 151, ¶28.

173. *See* TFG Troops seize OLF Fighters, ETHIOPIAN HERALD, Dec. 23 2009 (on file with author) (noting that the State media said: "Repeated attacks are being launched against Ethiopia by OLF, the Ogaden Liberation Front (ONLF) and the fundamentalist forces under the Union of Islamic Courts-forces that constitute the front of destruction created by Shaiebia.").

174. *Ethiopian military operation do not target people of Somalia*, KILIL 5 ONLINE, Dec. 25, 2006 (2010-09-28 04:16 +0000), http://www.kilil5.com/news/5385_ethiopian-military-operation-do-&print.

175. *Meles says Ethiopia forced into war: PM Meles*, KILIL 5 ONLINE, Dec. 26, 2006, http://www.kilil5.com/news/5353_meles-says-ethiopia-forced-into- (last visited Oct. 9, 2010).

> [T]he group was told to withdraw the anti-Ethiopian forces it gathered from the areas it controls, to stop sheltering these forces and infiltrating them into Ethiopia, to lift the war it declared against Ethiopia and address our differences through negotiation.[176]

Therefore, to the extent that these forces are in the areas within the effective control of the UIC and the UIC is not willing to see to the problem, Somalia is in breach of its international obligation.[177] But Somalia is a failed state in which no responsible government exists.[178] This unique paradigm of a failed state situation coupled with the threat of extremist militancy revamps Ethiopia's position. Although some may hold that the four factors do not to meet the requirements of the law that seeks to allow force only as a measure of a last resort, the absence of an internationally responsible actor within Somalia could be seen as an additional factor that dispenses with the excessively restrictive regime of necessity.[179] Therefore, the failed state situation in Somalia and the cumulative effect of the four factors that Ethiopia presented as creating what it called a situation of "clear and present danger", could be seen to have created a state of necessity that allows a temporary right to use a proportionate force to remove the threat not an all out invasion.[180]

B. Armed Response Must be Proportional: The Proportionality[181] Test

Thomas M. Franck marvelously captures the hub of the doctrine of proportionality in the following terms:

> The doctrine held that (1) any State resorting to war should calibrate its response in proportion to the demonstrable wrong perpetrated against it, and that (2) the means deployed as a countermeasure against a perpetrator be proportionate to the minimum force necessary to achieve redress. The doctrine was designed to ensure that States would not resort to unprincipled and unnecessarily brutal violence under cover of redressing an alleged wrong.[182]

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176. ETHIOPIAN HERALD, Dec. 26, 2009, at Vol. LXIII, No. 091, p. 9 (on file with author).

177. Since the situation in Somalia is unusual and one marred by militancy and extremism on the one hand and a failed-state-situation on the other, one might argue that the classical rule of international law which required States to refrain from these acts may not fit neatly into the Somali paradigm. In those cases, States might be justified in taking a proportionate response to an armed attack which already occurred or already begun to occur. Nonetheless, the threshold of threat in this case is much lower than required by the law. What exacerbated the situation more than the actual threat are the hostilities of the parties towards one another and the existence of special interest by powerful nations such as the United States.

178. *See Quick Guide: Somalia's Islamists,* BBC NEWS (last updated at 08:37 GMT, Thursday, 28 December 2006), http://news.bbc.co.uk/2/hi/africa/6043764.stm.

179. Franck, *On Proportionality of Countermeasures in International Law*, *supra* note 83, at 763.

180. *See* Clayton, *supra* note 141 (internal quotation marks omitted).

181. Franck, *On Proportionality of Countermeasures in International Law*, *supra* note 84, at 715 ("Put formulaically, most proportionality discourse occurs when A has done (or threatens to do) *X* to *B*, and *B* responds by doing *Y* to *A*. The issue then crystallizes as an inquest into whether counter-measure *Y* is "equivalent" (i.e., proportionate) to *X*.").

182. *Id.* at 719.

Proportionality is a principle of law inextricably tied to the principle of necessity and requires the acts of self-defense to be proportionate to "the necessity provoking them."[183] The application of this abstract but insurmountably vital principle to situations of military conflict has never been an easy task. Proportionality, as a principle that governs both the resort to force and the means and methods relating to the conduct of hostilities, remains one of the most controversial principles that involves, to borrow from Thomas Franck, "an awkward balancing of apples and oranges."[184] However, the paramount need "to prevent war but, failing that, to humanize the conflict as much as possible" makes proportionality one of the most celebrated principles, even an important conception of law, constantly invoked in international law.[185]

In *Nicaragua*, the ICJ declared the conduct of the United States as disproportionate noting that:

> [The] United States' mining of Nicaraguan ports and attacks on the ports, oil installations, etc., do not satisfy the criterion of proportionality. 'Whatever uncertainty may exist as to the exact scale of the aid received by the Salvadorian armed opposition from Nicaragua, it is clear that these latter United States activities in question could not have been proportionate to that aid.[186]

In the *Territory of the Congo*, the Court did not find a right of self-defensive measures by Uganda.[187] However, the Court proceeded to examine the proportionality of the self-defense measures. On proportionality, the Court pronounced that "the taking of airports and towns many hundreds of kilometers from Uganda's borders would not seem proportionate . . . nor []be necessary."[188]

The principle calls for a right and sensible balance between the threat faced and the response aimed at removing that threat.[189] As various fact situations are peculiar and present unique realities, the universe of proportionality remains amenable to ambiguity. However, it must not succumb to unprincipled individual evaluations justifying the use of brute force to aggravate the calamities of resort to force and the ensuing war. What provoked Ethiopia's resort to force was not a particular attack against its territory or a single threat against its national security. As discussed in previous sections, the Ethiopian government identified a wide range of potential threats including, but not limited to, the declaration of the holy war against it and the Ethiopian rebels operating from within Somalia which, according to the Ethiopian government, are working with common design and

183. Schachter, *supra* note 135, at 1637.

184. Franck, *On Proportionality of Countermeasures in International Law*, *supra* note 83, at 716.

185. *Id.* at 723.

186. *Nicaragua*, 1986 I.C.J. at 367, ¶ 211.

187. *Territory of The Congo*, 2005 I.C.J. at 223, ¶ 147.

188. *Id.*

189. *See* David DeCosse, *Lost in the 'Logic of War'*, SANTA CLARA UNIVERSITY MARKULA CENTER FOR APPLIED ETHICS, http://www.scu.edu/ethics/publications/ethicalperspectives/logic.html (last visited Sept. 26, 2010).

purpose with the UIC and the Eritrean government.[190] Even if one finds Ethiopia to be in a state of necessity, Ethiopia's occupation of cities and airports far away from its borders cannot be a proportionate measure limited at removing the threat that created the necessity of self-defense.

Ethiopia is certainly under a more threatening situation that justifies the resort to force compared to Uganda. Uganda could have probably averted the danger posed to its territorial integrity and political independence by working with the DRC, or failing that, bringing the issue to the Security Council to seek authorization in exercising its right to self-defense. Also, Uganda could have brought the DRC before the ICJ alleging its failure to prevent the rebels from using its territory for illegal activities aimed at endangering its sovereignty. Ethiopia, on the other hand, did not have any such choice as the UIC is not a recognized international actor despite its *de facto* control of a large portion of the Somali territory and could not have been stopped through such means.[191]

On proportionality, like Uganda, Ethiopia has occupied cities and an airport far away from its borders.[192] After removing the UIC from Mogadishu and other major towns of Somalia, Ethiopia made its withdrawal contingent upon the deployment of an African Union peacekeeping force.[193] According to Ethiopia, it remained in Somalia to assist the internationally recognized transitional government without an international mandate, and to also ensure that the terrorists will not return to the position that they were held before they were driven from the capital.[194] The elimination of the threat against its stability requires the restoration of peace and an effective government in Somalia. If Somalia remains an insecure region, it could continue to pose a threat to the peace and security of Ethiopia and the region.

Writing on the proportionality of self-defensive measures, Oscar Schachter reached the conclusion that a State that suffered a frontier attack does not "bomb cities or launch an invasion."[195] Ethiopia, even if it was under an actual armed attack at the relevant time, cannot proceed to the hinterlands of Somalia and remain there for a period of two years in the exercise of self-defensive measures aimed at removing the danger that created a state of necessity. As stipulated in *Caroline*, the necessity of self-defense must be limited to removing the danger that created the condition of necessity.[196] If Ethiopia's defense has rested on its inherent

190. *See* TURKISHPRESS.COM *supra* note 142.

191. *See Somalia - Amnesty International Report 2007*, AMNESTY INTERNATIONAL, http://www.amnesty.org/en/region/somalia/report-2007 (last visited Oct. 8, 2010).

192. *See* U.N. Security Council, *Report of the Secretary-General on the Situation in Somalia*, ¶¶ 2-5, U.N. Doc. S/2007/115 (Feb. 28, 2007).

193. *See Ethiopia 'Bogged Down' in Somalia*, BBC, GLOBAL POLICY FORUM, Nov. 27, 2007, http://www.globalpolicy.org/component/content/article/199/40868.html; Jason McLure & Hamsa Omar, *Ethiopia Agrees to Withdraw Troops from Somalia*, BLOOMBERG, Oct. 27, 2008, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ao7G53sBBsXY&refer=home.

194. *See Ethiopia PM, US Intelligence Committee Discuss Terrorism, Somalia*, SUDAN TRIBUNE, Feb. 22, 2007, http://www.sudantribune.com/spip.php?article20382.

195. Schachter, *supra* note 135, at 1637.

196. *See British-American Diplomacy: The Caroline Case*, Enclosure 1-Extract from Note of April

right to self-defense and lawful self-defense is accompanied by adherence to the principles of necessity and proportionality, even if we assume that Ethiopia has faced an imminent peril to its "essential interests" and hence under a necessary situation that justifies the use of force, Ethiopia's response goes way beyond what is necessary to avert the danger and is disproportionate to the threat posed against its territorial integrity and political independence.

What is interesting, also striking as odd, is the silence of the Security Council, the General Assembly of the UN, and the African Union in the face of what seems to be a disproportionate use of force against the territorial integrity and political independence of Somalia. These organs have envisioned the TFG and the TFG Charter as the only path to the restoration of peace and stability in Somalia.[197] At the same time, the TFG supported the Ethiopian intervention,[198] which could not have existed had it not been for the protection extended to it from Ethiopia. Politically speaking, Ethiopia's measure to intervene and remain in Somalia seems to have accorded with the interests of these international and regional organizations.[199] However, these organs have not expressly authorized Ethiopia to act as it did and nor did they condemn its action.[200] In fact, speaking in retrospect, the Ethiopian Prime Minister said "the United Nations Security Council did not put into question the measure we took in self-defense. Similarly various [g]overnments in different parts of the world have supported our right to self-defense and have refrained from putting out any kinds of declarations which might have put into question our inherent right of self-defense."[201] Does the concurrence of will between Ethiopia and these organizations, the positing of the issue as essentially part of the global war on terror by both Ethiopia and the United States, and the attendant silence of the Security Council remove the de-legitimizing aspects of Ethiopia's military action? Is international law moving to the recognition that the gravity of the danger and potential threat posed by acts of terrorism, the most acclaimed problem of the first decade of the 21st century, is subject to a lighter standard of necessity and proportionality? These are among the problems international law must confront head-on in the times to come.

Whatever political significance one might ascribe to Ethiopia's decision to push into the heartlands of Somalia and remain there for two years,[202] its action does not appear to be legally proportionate to the needs that triggered the self-defensive measure. Ethiopia might contend that it has done so to offer the Somali people the chance to reconcile, solve their differences and form a government.

24, 1981, YALE LAW SCHOOL AVALON PROJECT, http://avalon.law.yale.edu/19th_century/br-1842d.asp#web2 (last visited Sept. 27, 2010).

197. *See* AMNESTY INTERNATIONAL, *supra* note 192.

198. See Fanta, *supra* note 1.

199. *See* AMNESTY INTERNATIONAL, *supra* note 192.

200. *See id.*

201. Prime Minister Meles Zenawi, Ministry of Foreign Affairs of Ethiopia, Speech to the Parliament (Jan. 2, 2006) *available at* http://www.mfa.gov.et/Press_Section/publication.php?Main_Page_ Number=3311.

202. *See* Sophia Tesfamariam, *Somalia: Two Years After the US-Backed Invasion and Occupation*, AM. CHRONICLE, Dec. 4, 2008, http://www.americanchronicle.com/articles/view/83924.

Indeed, one could argue that Ethiopia created an ample opportunity for the Somalis and the international community to work towards the creation of an effective and inclusive Somali government. As complex as Somalia's political problems may be, an international coalition could have provided a better political and/or military solution to Somalia's decades of lawlessness. Even in this light, the best designation that could probably describe Ethiopia's action might be that used in justifying the illegal bombardment of Kosovo by NATO—may be illegal but justified.

V. CONCLUSION

The legality of Ethiopia's military intervention in Somalia presents a complex maze of dilemmas dictated by the realities of a failed state scenario and a modern threat of terrorism. Ethiopia claims that the invitation by the legitimate and recognized government of Somalia and its lawful right to collective and individual self-defense justified its military intervention.[203] Examining the validity of these claims involves an appreciation of highly contested facts and unverifiable allegations.

Ethiopia argued that its actions are consistent with the letter and the spirit of Article 2(4) since it amounted to a lawful exercise of the right to individual and collective self-defense under Article 51 of the Charter.[204] Although Ethiopia did not insist on the existence of a significant armed attack, without ruling out the fact that an armed attack existed, it claimed that a combinations of four factors have created a condition of "clear and present danger" against its territorial integrity and political independence: a) the presence of Eritrean troops, a country with an entirely non-Somali agenda in Somalia; b) the consolidation of power in the hands of radical Islamic militants part of whom Ethiopia considers as "terrorists" with the manifest intention of annexing Somali speaking region of Ethiopia; c) UIC's declaration of a holy war against Ethiopia; and d) the presence of armed Ethiopian and other foreign forces working with common design and purpose with the UIC.[205] Along with the declaration of the Holy war, Ethiopia sees individuals within the UIC leadership as a greater threat than the UIC itself.[206] Explaining this distinction, the Ethiopian government pinpoints to Sheik Hassen Dahir Aweys, once head of the *Al-Itihad*, an organization on the United States' list of terrorist organizations and the man that Ethiopia holds responsible for terrorist acts in its territories.[207]

It contends that the cumulative effect of all these factors put Ethiopia in a state of necessity that justified self-defense in anticipation of an eminent and overwhelming attack. Though the standard of what is instant and overwhelming is

203. *See* Prime Minister Meles Zenawi, *supra* note 202.

204. *See* William A M Henderson, *The Use Of Force In Somalia And Issues Relating To The Legality Of Ethiopian And United States Intervention*, OPTICON, Spring 2008, at 1, 2, 4, *available at* http://www.ucl.ac.uk/opticon1826/archive/issue4/Art_Laws_Henderson_SomaliaIntervention_Pub.pdf.

205. *See* sources cited *supra* note 143.

206. *See* Joseph Winter, *Profile: Somalia's Islamist leader*, BBC NEWS (Friday, 30 June 2006, 07:39 GMT) http://news.bbc.co.uk/2/hi/5120242.stm.

207. *Id.*

very subjective, the cumulative effect of these threats coupled with the failed State dynamic in Somalia, could be seen to create a state of necessity grave and eminent enough as to trigger the right to self-defense. However, Ethiopia's armed penetration deep into the heartlands of Somalia and its occupation of Mogadishu and other cities, was not in any way proportional to the danger posed against the Ethiopian state and goes beyond removing the threats that created the necessity of self-defense. Therefore, on the issue of proportionality, Ethiopia's action goes beyond what is strictly required under the circumstances to avert the danger posed against it and hence contravenes one of the conditions for lawful self-defense under international law.

However, one should also appreciate the nature of the danger Ethiopia faced: a complex mix of threat posed by Eritrea and UIC, and its own political interests to wipeout armed opposition groups that operate from within Somalia.[208] Ethiopia being an important ally of the Bush administration on the global war on terror,[209] there is also a global political dimension to the conflict which may explain why most states have failed to question the legality of the war or require a debate in the Security Council or elsewhere. Ethiopian government officials have echoed the notion that Ethiopia's security and respect for its territorial integrity and long term political independence anticipates the stability of Somalia.[210] They argued that unless Somalia becomes a stable, democratic and responsible partner in the international system, it will remain a breeding land for "terrorism" and will continue to pose a threat not only to Ethiopia and the region but also to the international community.[211] One could probably attribute the silence of the Security Council, the General Assembly, and the African Union to the recognition of this claim or the meeting of minds on this point.

In conclusion, Ethiopia's claim to self-defensive measures does not seem to be in line with the requirements of the UN Charter because it fails to meet the requirement of an occurrence of an attack of a significant *scale* and *effect* before recourse to the self-defensive measure. Under customary international law, although Ethiopia could be seen to be under an imminent threat of attack triggering the right of recourse to a proportionate response, it certainly went beyond what is necessary to remove the threat and used a disproportionate force.

208. *See* Prime Minister Meles Zenawi, *supra* note 202.

209. Shashank Bengali, *Rice's Visit to Ethiopia Puts Focus on Ally Accused of Human Rights Abuses*, MCCLATCHY NEWSPAPERS (December 04, 2007 08:11:05 PM), http://www.mcclatchydc.com/2007/12/04/22561/rices-visit-to-ethiopia-puts-focus.html.

210. *See* Prime Minister Meles Zenawi, *supra* note 202.

211. *See* sources cited *supra* note 143.

A NEW STATE IN THE 21ST CENTURY: KOSOVO'S PATH TO INDEPENDENCE

*Reviewed by Alonit Cohen**

HENRY H. PERRITT, JR., THE ROAD TO INDEPENDENCE FOR KOSOVO: A CHRONICLE OF THE AHTISAARI PLAN (2010).

In THE ROAD TO INDEPENDENCE FOR KOSOVO: A CHRONICLE OF THE AHTISAARI PLAN, Professor Henry Perritt explains the Kosovar Albanians' desire for a state of their own and the process they, and the world, went through to get it. This book review will first introduce the history of Kosovo. This will be followed by a summary of Professor Perritt's description of the negotiations between Kosovo and Serbia and the legal issues considered; the plan that the negotiation team proposed to the Security Council and the Security Council's failure to implement it; and Kosovo's unilateral declaration of independence in 2008. Finally, this review will discuss the weaknesses of the book, noting that Professor Perritt's tone and lack of sources leave the reader questioning whether the book presents an unbiased account of the dynamic and controversial events that occurred.

I. THE RECENT HISTORY OF KOSOVO

Kosovo declared independence from Serbia on February 17, 2008, in accordance with the Ahtisaari Plan and with the support of the United States, most members of the European Union, and tens of other states.[1] The dynamic and violent history of this region in the last century, which led to Kosovo's declaration of independence, began when Kosovo became an "administrative region" of Serbia during the Kingdom of Yugoslavs between the world wars. After WWII, Kosovo had a similar status within the Socialist Federal Republic of Yugoslavia (SFRY).[2] SFRY was made up of six republics: Bosnia, Croatia, Macedonia, Montenegro,

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1. Dejan Anastasijevic, *Joy in Kosovo, Anger in Serbia,* TIME, Feb. 17, 2008, *available at* http://www.time.com/time/world/article/0,8599,1714164,00.html; *see* ABA RULE OF LAW INITIATIVE, LEGAL PROFESSION REFORM INDEX FOR KOSOVO, 5 (vol. III 2009), *available at* http://www.abanet.org/rol/publications/kosovo_lpri_vol_iii_05_09_en.pdf.

2. LIBRARY OF CONGRESS, YUGOSLAVIA: A COUNTRY STUDY (Glenn E. Curtis ed., 1992), http://memory.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+yu0012).

Serbia, and Slovenia; and two autonomous regions within Serbia: Kosovo and Vojvodina. Under the 1974 SFRY constitution, Yugoslavia gave Serbia's autonomous regions an increased limited sovereignty over their police forces, courts, and civil institutions.[3] However, in May of 1989, Slobodan Milosevic was elected president of Serbia, and immediately started reducing these freedoms.[4] As President, Milosevic controlled the Yugoslav People's Army during the violent break-up of Yugoslavia in the early 1990's, during which around 200,000 civilians were killed through ethnic cleansing and genocide.[5] In 1997, Milosevic stepped down as Serbia's president, in order to serve as the President of greater Yugoslavia. Just a year later, the conflict in Kosovo would begin.

In the second half of the 20th century, Kosovo had a large ethnic majority of Kosovar Albanians, and a much smaller minority of ethnic Serbs. In 1989, President Milosevic introduced a system of martial law in Kosovo and stripped much of its political autonomy.[6] He instituted a policy of ethnic Serb dominance in industry, policymaking, teaching, the law and its enforcement.[7] Throughout the 1990s, young male Kosovar Albanians formed a guerrilla force, known as the Kosovo Liberation Army (KLA), to oppose the Serbs.[8]

The KLA guerrilla forces initiated attacks against the Yugoslav National Forces in early 1998, to fight for the freedom of the Albanian Kosovars from Serbian oppression.[9] The Yugoslav National Forces responded by purposefully committing acts of ethnic cleansing against the Kosovar Albanians.[10] For the next year, NATO met with the Serbian government intermittently in an attempt to halt the atrocities in Kosovo. At the same time, NATO provided evacuation and relief aid to the Kosovar refugees.[11] In March of 1999, after the intensity of the attacks on civilians increased, United States Ambassador Richard Holbrooke independently met President Milosevic to persuade him to stop the attacks in Kosovo or face imminent NATO strikes.[12] When President Milosevic refused, NATO made the unanimous decision on March 23, 1999 to enter the region on behalf of the endangered civilians.[13] "The Alliance want[ed] to stop further

3. ABA RULE OF LAW INITIATIVE, LEGAL PROFESSION REFORM INDEX FOR KOSOVO, 5 (vol. III 2009), *available at* http://www.abanet.org/rol/publications/kosovo_lpri_vol_iii_05_09_en.pdf.

4. Olga Nikolić, *Šefovi Srbije i Jugoslavije od 1987 do 2000* [*Heads of Serbia and Yugolsavia from 1987 to 2000*], GLAS JAVNOSTI, Sept. 18, 2000, http://arhiva.glas-javnosti.rs/arhiva/2000/09/18/srpski/P00091701.shtm.

5. CAROLE ROGEL, THE BREAKUP OF YUGOSLAVIA AND THE WAR IN BOSNIA 37 (1998).

6. ABA RULE OF LAW INITIATIVE, *supra* note 3.

7. ABA RULE OF LAW INITIATIVE, *supra* note 3, at 5, 7.

8. *Id.* at 5.

9. *See* HUMAN RIGHTS WATCH, FEDERAL REPUBLIC OF YUGOSLAVIA: HUMANITARIAN LAW VIOLATIONS IN KOSOVO (vol. 10 1998), http://www.hrw.org/reports98/kosovo/ (follow "Violations of the Rules of War by Government Forces" hyperlink).

10. U.S. STATE DEPARTMENT, ETHNIC CLEANSING IN KOSOVO: AN ACCOUNTING 5, 9 (2d report Dec. 1999), *available at* http://www.state.gov/www/global/human_rights/kosovoii/pdf/kosovii.pdf.

11. *NATO's Role In Kosovo: Historical Overview*, NORTH ATLANTIC TREATY ORGANISATION (July 15, 1999), http://www.nato.int/kosovo/history.htm (last visited Oct. 10, 2010).

12. *Id.*

13. *Id.*

serious, systematic human rights violations and prevent a humanitarian catastrophe in Kosovo."[14] NATO forces, entirely airborne, commenced a bombing campaign against the Yugolsav National Forces that lasted seventy-eight days.[15]

On the final day of the bombing campaign, the United Nations (UN) Security Council adopted Resolution 1244 which demanded the end to all violence and repression by Yugoslavia in Kosovo and the withdrawal of all forces.[16] Russia, Serbia's close ally, sent its envoy Viktor S. Chernomyrdin to inform President Milosevic that "he had no choice but to accept the West's demands" and President Milosevic pulled his troops out of Kosovo. [17] In addition, Resolution 1244 authorized member states of the UN to establish two organizations within Kosovo: an international security presence, Kosovo Force (KFOR),[18] and an international civilian presence, known as the United Nations Mission in Kosovo (UNMIK).[19] UNMIK would act as a "transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo."[20] Under UNMIK, this international civilian presence was authorized to facilitate "a political process designed to determine Kosovo's status."[21] At the time, the United Nations expected that Kosovo's "status" eventually would return to that of a region within Serbia.[22] However, the United States and the majority of Kosovo expected otherwise.[23]

From 1999 to 2004, UNMIK aided the Kosovar Albanians in creating a government and society for themselves, through civil administration, democratization and institution building, reconstruction and economic development, and humanitarian assistance. However, it did not begin the process of determining Kosovo's final status of whether it would become an independent nation or return to Serbia as a province until 2004.[24] In the meantime, KFOR

14. Press Release, Federal Chancellor Gerhard Schröder (Mar. 24, 1999), *reprinted in* HEIKE KRIEGER, THE KOSOVO CONFLICT AND INTERNATIONAL LAW: AN ANALYTICAL DOCUMENTATION 1974 – 1999 399 (2001).

15. ROGEL, *supra* note 5, at 80.

16. S.C. Res. 1244, ¶ 3, U.N. Doc S/RES/1244 (June 10, 1999).

17. Richard Bourdreaux, *With Surrender, Milosevic Now Must Face the Music at Home,* L.A. TIMES, June 4, 1999, at 2, http://articles.latimes.com/1999/jun/04/news/mn-44060/2. By the end of May 1999, NATO estimated that 5,000 Kosovar Albanians had been killed as a result of ethnic cleansing, and 1.5 million people had been expelled from their homes. *NATO's Role In Kosovo: Historical Overview*, *supra* note 11. Milosevic was indicted by the International Criminal Tribunal for Yugoslavia (ICTY) in the Hague in 2002 for war crimes and crimes against humanity in Kosovo, as part of an amended indictment that originally included his crimes in the previous Croatian and Bosnian wars. He died in 2006 before a verdict could be reached. Prosecutor v. Milosevic, et al., Case No. IT-99-37-I, Third Amended Indictment (Int'l Crim. Trib. for the Former Yugoslavia July 19, 2002).

18. S.C. Res. 1244, *supra* note 16, at ¶ 7.

19. *Id.* at ¶ 10.

20. *Id.*

21. *Id.* at ¶ 11(e).

22. HENRY H. PERRITT, JR., THE ROAD TO INDEPENDENCE FOR KOSOVO: A CHRONICLE OF THE AHTISAARI PLAN 64 (2010).

23. *Id.* at 63.

24. *Id.* at 79-80, *see id.* at 91.

maintained general security, although violent disputes between ethnic Albanians communities and ethnic Serb communities occasionally erupted.

II. SUMMARY OF THE ROAD TO INDEPENDENCE FOR KOSOVO

A. The Negotiations

Professor Perritt begins his book by narrating the 2004 riots initiated by the Kosovar Albanians in Pristina, Kosovo's capital.[25] Kosovar Albanians were frustrated with UNMIK's oversight and delay in the final status negotiation process that had been called for in Security Council Resolution 1244, five years prior. On March 16, 2004, Kosovar Albanian youth responded by destroying UNMIK vehicles and attacking the homes of Serbs with rocks and fire.[26] According to Professor Perritt, the violent riots were the healthy catalyst to start the international negotiation process, which began in February of 2006 in Vienna, with direct talks between Belgrade and Pristina representatives.[27]

UN Resolution 1244 required UNMIK to facilitate a political process regarding Kosovo's status. UN Secretary-General Kofi Annan selected former Finland President Maarti Ahtisaari to direct the negotiation process because of his strong negotiation background in Africa, Asia, and the Balkans.[28] Professor Perritt portrays the negotiations as Serbia pursuing hard line policies and unrelenting power over Kosovo.[29] Professor Perritt also describes Kosovo's lack of diplomacy at the beginning of the negotiations, and how the U.S. and European countries strongly controlled Kosovo during the negotiations.[30]

The negotiation team and the parties met jointly to discuss the delicate issues of decentralization (creation of municipal governments); "minority rights" (rights of the Serb communities in Kosovo); the "right of return" (Serbs rights to return from northern Serbia to their homes in Kosovo); and protection of religious sites.[31] Compromises were difficult to come by, and rarely, if ever, occurred.[32] The most difficult negotiations were over the final status of Kosovo, where no real progress was ever made.[33] Although the rounds of negotiations failed, Professor Perritt commends President Ahtisaari and his team for their role in creating the "Ahtisaari Plan."[34] The plan, after almost fourteen months of failed negotiations between Kosovo and Serbia, was presented to the Security Council on March 26, 2007.[35] It detailed a process for creating the independent state of Kosovo and the development of international oversight in the region. However, international

25. *Id.* at 5-11.
26. PERRITT, *supra* note 22, at 121.
27. *Id.* at 81, 145.
28. *Id.* at 111-13.
29. *Id.* at 144.
30. *Id.* at 145, 158.
31. *See id.* at 145-52.
32. *Id.*
33. *Id.* at 157-60.
34. *Id.* at 159-60.
35. *Id.* at 165.

politics, supported by international legal concerns, immobilized the Security Council, which never voted to enact the plan.

B. Legal Issues in the Negotiations

Professor Perritt explains that the legal premises behind Serbia's (and Russia's) argument for the return of Kosovo to Serbia were that (1) today's international system supports state sovereignty, and (2) Resolution 1244 did not recognize potential independence for Kosovo.[36] Rather, Resolution 1244 recognized the need to return the region of Kosovo to Serbia.[37] Since 1945, new states have achieved statehood when republics and federations broke up (such as the USSR) or former colonies separated from their colonial state. In addition, no state formed since 1945 has been admitted to the UN over objections from its original overarching state.[38] Allowing a portion of a state to secede over the objection of its larger state is against international norms.[39] Kosovo was never considered a republic with the right to secede from Yugoslavia, rather it was an autonomous region within the Republic of Serbia.[40] If the UN allowed Kosovo to become independent, this would go against the international legal norm of the last sixty years that prohibits unilateral secession.[41]

Professor Perritt states that Kosovo's legal arguments for an independent state were that 1) Serbia forfeited the right to govern Kosovo during the war; 2) Serbia continued to relinquish sovereignty when it did not take governmental control over the territory of Kosovo after the war; and 3) that Resolution 1244 applied only to the interim arrangement for Kosovo, not final status.[42] According to the emerging international legal norm *responsibility to protect*, if a state fails to protect its citizens, an international or foreign military may enter into the sovereign territory.[43] Thus, Serbia forfeited the right to govern Kosovo when it failed to protect its Albanian citizens in the 1999 war, and in fact, actually committed crimes against its citizens.[44] In addition to Serbia forfeiting its right to govern in 1999, sovereignty and statehood depend upon a government's ability to exercise control over the territory of the State.[45] Serbia continued to ignore its governing role for the Albanian majority living in Kosovo (98% of the population), and UNMIK and KFOR exercised effective control over the region.[46] Thus, Serbia

36. PERRITT, *supra* note 22, at 121.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *See id.*
42. PERRITT, *supra* note 22, at 121-23.
43. *Id. at* 121; *see also* INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), *available at* http://www.iciss.ca/report-en.asp; RESPONSIBILITY TO PROTECT: THE GLOBAL MORAL COMPACT FOR THE 21ST CENTURY (Richard H. Cooper & Juliette V. Kohler eds., 2009).
44. PERRITT, *supra* note 22.
45. *Id.* at 123.
46. *Id.*

relinquished its sovereignty over Kosovo.[47] Finally, according to the Kosovar Albanians, a close reading of UN Resolution 1244 showed that the words "autonomous," "self-administration" and "self-government" applied to the interim situation in Kosovo, but did not apply to the future status of the region.[48]

C. *The Failure of the Security Council*

The most novel aspect of the book is its discussion of the dichotomy between the successful creation of the Ahtisaari plan and Security Council's failure to implement it. The Secretary-General of the UN established the negotiation team to aid in the final status talks between Kosovo and Serbia. The talks themselves, over a period of fourteen months, failed.[49] However, President Ahtisaari created a plan for the UN that would give Kosovo independence, allow for continuing international oversight and peacekeeping forces in the region, and establish a system to protect the Serb minority living within Kosovo.[50] Unfortunately, the UN did not act on the recommendation because of a deadlock in the Security Council.[51] Russia, in an effort to wield its political strength while holding the presidency of the Security Council, would not bring the plan to a vote, and would likely have vetoed the plan based on Serbia's legal arguments, had it been put to vote at a later date.[52] This allowed other smaller countries to follow suit, pledging not to support the recommendation. If the Security Council's role is to prevent war and promote peace, then by not acting on the Ahtisaari plan, the Security Council failed.[53] Regardless, because Kosovo declared unilateral independence with the backing of the United States and most of Europe, Professor Perritt acknowledges that state interests can circumvent the Security Council, at least when powerful states are involved.[54]

III. CRITIQUE

A. *Professor Perritt's Tone*

In the first twenty pages of the book, Professor Perritt startles the reader when he describes how he, as the Dean of Chicago-Kent College of Law, lied to get visas for a group of faculty and students to travel to Kosovo in December of 1998 (as well as lying to get their rental car).[55] This was during the time when the refugee problem was escalating, and the KLA and Serbian forces were fighting one another in civilian areas.[56] Then he "pestered the UNHCR" (UN Refugee Agency) into taking himself and the students to a KLA stronghold where they could see the action.[57] There is no question that humanitarian support is important during such a

47. *Id.*
48. *Id.*
49. *Id.* at 165.
50. *Id.* at 166, 164.
51. *Id.* at 178.
52. *See id.* at 178-79, 192-93.
53. *Id.* at 275-76.
54. PERRITT, *supra* note 22; *see id.* at 183.
55. PERRITT, *supra* note 22, at 41.
56. *Id.*
57. *Id.* at 43

crisis, but in this case, Professor Perritt took law students through a war zone to administer "aid" – setting-up internet on a few computers in the UNHCR office in Pristina.[58] Although the reader may be surprised by Professor Perritt's judgment, it is also important to note that this story illustrates that he has first hand knowledge of Kosovo in the late 1990's that he contributes to the book.

1. Supporting Documents and Sources

The story of the negotiations and the inner thoughts of the negotiating team should be bolstered by additional sources. While the results of the negotiations are publically accessible, the negotiations themselves were held behind closed doors. Professor Perritt seems to have a deep knowledge and understanding of what happened in the negotiations, but his numerous citations to anonymous sources and interviews leave the reader wondering how he gathered information to write this book. Moreover, the reader must accept blindly that these anonymous sources were impartial. There is no doubt that many sources would feel uncomfortable divulging information on record that may portray top-level politicians in a negative light. Regardless, it is difficult not to be wary of first hand interviews conducted under complete anonymity. For example, Professor Perritt described the Serbs' strategy of "delay, destabilize, divide, and discredit" without a single citation or explanation of how he could have gathered that information.[59]

2. Possible Bias or Inaccuracies

Professor Perritt adamantly supports Kosovo's independence, which seems to lead him to portray some of the events concerning Serbia with less accuracy. Crucial details in the descriptions of events concerning Serbia are sometimes missing. For example, Professor Perritt comments on the widespread Serbian nationalism and violent behavior by explaining how at the "Kosovo is Serbia" rally in Belgrade, five days after Kosovo declared independence, "150,000 demonstrators got out of control and set fire to the U.S. and British embassies in Belgrade, ransacked the McDonald's again, and looted stores.[60] However, most of the international news coverage of this incident suggests that Professor Perritt's account is incorrect. Rather, news sources state that up to 150,000 Serbs marched peacefully from the parliament building in Belgrade to an orthodox church about a mile away in an effort to show democratic peaceful resistance toward Kosovo's declaration, while only up to one thousand young men separated from the peace march to riot and attack the embassies.[61] There is no question that there are violent

58. *Id.* at 41-42.

59. *Id.* at 127.

60. *Id. at* 218.

61. The most widely held view is that the attack was carried out by a fringe of staunch nationalists, many of them poor and from Serbia's rural heartland, whose economic disillusionment, coupled with raw and real anger over Western backing of Kosovo's independence, has boiled over into violent opposition to the United States and the European Union, which are viewed as the architects of the "false state"). *See* Interview by Amy Goodman with Liljana Smajlovic, Editor in Chief, Politika (Feb. 22, 2008), *available at* http://www.democracynow.org/2008/2/22/report_from_belgrade_serbian_protesters_set; *All Things Considered: Rioters Burn Vacant U.S. Embassy in Belgrade* (Feb 21, 2008) (downloaded using iTunes), *available at* http://www.npr.org/templates/story/story

Serb nationalists, but Professor Perritt leaves out the crucial detail that the majority of Serbia approached Kosovo's declaration of independence in a democratic way.[62] Noting that Professor Perritt never cites to a specific Serbian source throughout the whole book, these details leave the reader questioning whether Professor Perritt accurately portrayed the facts concerning the Serbs and their actions throughout the whole final status process.

B. Professor Perritt's Promotion of the Ahtisaari Process

Professor Perritt concludes that, "For once in the Balkans, political transformation occurred through international diplomacy without prolonged violence as a stimulus. The hope is that the Ahtisaari and Troika processes provide a model that will be followed in the future."[63] This conclusion is surprising, considering that Professor Perritt described the failure of the diplomatic efforts in the negotiations between Kosovo and Serbia, and then the failure of international diplomacy to convince the Security Council to approve the plan. A new country of two million people declared unilateral independence because of the failure to achieve a solution through international diplomacy. Thus, it seems inappropriate to hope that the Ahtisaari process should be used as a model in the future. While the Kosovar Albanians did achieve independence, it was in spite of this model, rather than as a result of it. A stronger argument would be to use the *responsibility to protect* as a model in future conflicts. The emerging international norm first appeared in 1999, to aid in the support of NATO intervention into Kosovo. In the future, this norm could discourage a State from attacking its own citizens, knowing that its actions could result in a loss of sovereignty in the region.

The ROAD TO INDEPENDENCE FOR KOSOVO is recommended for those who want to understand the generalities of peace negotiations, the process and struggles of achieving a new state in the 21st Century, and Kosovo's path to independence. However, because Professor Perritt's detailed knowledge of the Kosovo-Serbia negotiations is uncorroborated, readers should find additional sources to verify any specific information.

.php?storyId=19246285; *PBS Newshour: US Embassy Attacked in Protest Over Kosovo Independence* (Feb. 21, 2008) (downloaded), *available at* http://www.pbs.org/newshour/bb/europe/jan-june08/belgrade_02-21.html; Dan Bilefsky, *Serbia Seeks Rioters Who Set Fire to the U.S. Embassy*, N.Y. TIMES, Feb. 24, 2008, *available at* http://www.nytimes.com/2008/02/24/world/europe/24serbia.html

62. *Id.*

63. PERRITT, *supra* note 22, at 272.